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STRATEGIC LEGAL BULLYING

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Our competitive, market-based economy and adversarial legal system encourage strategic behavior among private parties. This system often yields positive economic results. The same system, however, can yield serious negative unintended consequences when unethical actors exploit the system's high costs to harm innovators, entrepreneurs, small businesses, non-profits, and society. In particular, strategic legal bullying exploits the high costs of the legal system to advance a baseless legal position that yields a favorable result at the expense of a much weaker party. This Article defines and analyzes this harmful practice in relation to frivolous or "sham" litigation. As defined in this article, strategic legal bullying goes far beyond sham litigation and encompasses a broad range of harmful strategic business activity. These various practices are assessed in relation to economic terms and classified as a form of rent-seeking behavior. The Article analyzes and categorizes various cases of strategic legal bullying and the defensive methods through which it can be contained. As discussed in the article, business norms, ethics, and corporate social responsibility play a vital role in ongoing efforts to combat the significant harmful effects that arise when companies abuse the legal system for strategic business gain.

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INTRODUCTION

> What is the right thing to serve our shareholders and our customers and our fundamental mission, which is about empowering people around the world? It starts with the law and then moves quickly to other things. If one tries to keep these things too separate, I think one can end up doing a disservice—not just to people who own the company as shareholders, but to the people who use our products and the world at large.
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> Brad Smith, Microsoft Chief Legal Officer.[1]

In a perfect world, law, business, and ethics would coexist in harmony, as exemplified by the above quote. In today's hypercompetitive and cutthroat business environment, how-

1. David Hechler, *Microsoft's Brad Smith Talks About Getting Kicked Upstairs*, CORP. COUNS. (Sept. 17, 2015), http://www.corpcounsel.com/id=1202737479938/Brad-Smith-Talks-About-Getting-Kicked-Upstairs?mcode=12026156220 21&curindex=10&slreturn=20151017163921.

ever, companies increasingly wield the law aggressively as a blunt instrument for strategic business purposes.[2] In their zealous pursuit to use the law for strategic purposes, some companies commit a disservice to others. For example, companies exploit the law when they engage in sham litigation to deter market entry to start-up innovators or when they avoid payment of employee overtime wages and aggressively draft arbitration clauses in consumer contracts.[3]

When companies use the law strategically, they risk overextending themselves and their legal arguments to the point of harassment and bullying. When this occurs, companies behave like bad citizens, or bad neighbors to employ the metaphor adopted in socio–legal research.[4] In socio–legal research, good neighborly norms play a primary role among parties to a dispute.[5] This research demonstrates that good neighborly

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2. A strategy is a plan for action intended to accomplish some goal. Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1428 (2000). A legal strategy involves a decision or set of decisions taken in response to or anticipation of a legal claim. Daniel T. Ostas, *Corporate Counsel, Legal Loopholes, and the Ethics of Interpretation*, 18 TEX. WESLEYAN L. REV. 703, 706–07 (2012). In the business literature, one of the principal writers on strategy states that "[c]ompetitive strategy is about being different. It means deliberately choosing a different set of activities to deliver a unique mix of value." Michael E. Porter, *What is Strategy?*, HARV. BUS. REV., Nov.–Dec. 1996, at 61, 64; *see also* Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 81–82 (2014) (discussing how law, in general, can be used to achieve private strategic benefits rather than just compliance or risk management-related goals). The corporate legal strategy perspective falls under the general umbrella of proactive law. *See* PROACTIVE LAW IN A BUSINESS ENVIRONMENT 59–106, (Gerlinde Berger-Walliser & Kim Ostergaard eds., 2012); GEORGE SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2011); *see also* Constance E. Bagley, *What's Law Got to Do With It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010); Jordan M. Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. (forthcoming 2017) (describing how regulatory entrepreneurs initiate legal change to sustain their business models); Robert C. Bird, *Law, Strategy and Competitive Advantage,* 44 CONN. L. REV. 61 (2011); Nadelle Grossman, *The Duty to Think Strategically*, 73 LA. L. REV. 449 (2013).

3. *See* CHRISTOPHER C. KLEIN, FEDERAL TRADE COMMISSION REPORT, THE ECONOMICS OF SHAM LITIGATION, 1 (1989) (defining sham litigation as "predatory or fraudulent litigation with anticompetitive effect, that is, the improper use of the courts and other government adjudicative processes against rivals to achieve anticompetitive ends").

4. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1994).

5. *Id.*

norms of fairness, reciprocity, and reputation far outweigh formal legal rules even though legal rights and doctrines are central aspects of private disputes.[6] As bad neighbors, companies that aggressively employ legal strategies to bully weak parties violate important business norms that underlie good corporate citizenship.[7]

This Article will examine a broad array of strategic corporate legal bullying practices that violate fundamental business norms such as fairness, reciprocity, reputation, and community responsiveness.[8] It is worth mentioning that a good deal of corporate legal strategy and business behavior abides by ethical norms and the spirit of fair play in the marketplace. Likewise, it is important to recognize that our culture and legal system encourage parties to strategize, innovate, and submit disputes to governmental bodies, which resolve these cases to benefit individuals and society.[9] Parties that operate within this inherently competitive, dynamic, and adversarial legal system strategically "bargain in the shadow of the law" to achieve efficient private outcomes.[10] Under our legal system, parties are

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6. *Id.*

7. Good corporate citizenship relies on the heavily debated conceptions of what it means to be "good" and a "corporate citizen" in today's marketplace. Much of this article will focus on bad corporate behavior referred to as strategic legal bullying and good behavior in light of business norms and corporate social responsibility. Corporate citizenship is a debated term, however; according to some scholars it arises when companies act as quasi-state actors and administer rights for other citizens. *See* Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 171–72 (2005) (stating that "[w]e thus contend that 'corporations' and 'citizenship' come together in modern society at the point where the state ceases to be the only guarantor of citizenship—and that a term such as *corporate citizenship* is a legitimate way of characterizing this situation").

8. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58–60 (1963) (discussing the role of some of these norms in the contracting process).

9. *See, e.g.*, *In re* Appraisal of Transkaryotic Therapies, Inc., Civ. Action No. 1554-CC, 2007 WL 1378345 (Del. Ch. May 2, 2007) (upholding the strategic legal practice known as appraisal arbitrage, where an investor buys stock in target companies after the record date for stockholder votes on a merger and then challenges the merger valuation to extract a higher price).

10. *See* Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (discussing the important role of legal norms as enablers of private agreements); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of*

allowed to advocate their preferences in a way that disadvantages competitors. As the U.S. Supreme Court stated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act.[11]

Prior scholars have analyzed the strategic use of the legal system to achieve private gains.[12] The legal realists were the first to recognize the strategic opportunities offered by the common law's flexible, dynamic, and indeterminate nature.[13]

Divorce, 88 YALE L.J. 950, 966 (1979) (discussing how parties achieve private ordering solutions when they take into account bargaining endowments created by legal rules and several other factors).

11. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961) (holding that it was not a violation of the Sherman Antitrust Act when railroad companies lobbied in favor of laws that threatened to disadvantage the competing trucking industry).

12. *See infra* notes 13–71 and accompanying text.

13. *See* JEROME FRANK, LAW AND THE MODERN MIND 42–47 (1930) (discussing how a company was advised by a strategic lawyer to reincorporate in a different state before bringing a contracts suit which would trigger the federal rule on diversity and thereby increase the chances that the court would invoke a favorable, out-of-state contracts doctrine that would uphold the parties' exclusivity agreement). Legal realism emphasizes empirically verifiable behaviors as key drivers of legal outcomes. *See* William B. Chandler, III, Chancellor, Del. Ch., *The Institutional Investor's Goals for Corporate Law in the Twenty-First Century*, *in* 25 DEL. J. CORP. L. 35, 65 (2000) ("[A]s others have described, the United States has a common law system that develops legal principles in an evolutionary way—interstitially, slowly, gradually, leaving great areas of uncertainty, unpredictability."); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 443–45 (1930). Strategic parties often take advantage of legal ambiguity to detriment their opponents. *See* Elizabeth Smith, *Eliminating Predatory Litigation in the Context of Baseless Trade Secret Claims: The Need for a More Aggressive Counterattack*, 23 SANTA CLARA L. REV. 1095, 1098 (1983) ("[T]he inherent difficulty in detecting baseless trade secret claims stems from the amorphous nature of the required elements.").

For example, in *Law and the Modern Mind*, Jerome Frank offered insights into the strategic nature of lawyering to achieve business gains.[14] In their important work on legal strategy, Lynn LoPucki and Walter Weyrauch state that "[l]awyers conceive and execute their strategies in an environment in which the rules for interaction are unclear and constantly in flux."[15] Law and economics scholars have demonstrated that uncertainties and costs innate to our legal system motivate parties to strategically bargain to obtain efficient private ordering solutions.[16] A central tension arises, however, since strategic legal behavior creates the opportunity and temptation for companies to overreach, violate important business norms, and unduly profit at the expense of those who are in a weaker position.[17] Those who find themselves in a weaker position include employees, consumers, individual entrepreneurs, small businesses, non-profits, and start-up companies.

To date, scholars have yet to examine the broad array of strategic legal techniques available to companies and their relation to the broader normative framework of business ethics. This Article aims to fill this research void by introducing and examining a form of strategic behavior labeled strategic legal bullying. One of the main contributions provided by this Article is the labeling, definition, and categorization of strategic legal bullying practices. This descriptive analysis then yields a framework for assessing the normative limits of what amounts

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14. FRANK, *supra* note 13. The research of prominent economists suggests that the common law's flexibility and responsiveness offers economic advantages vis-à-vis civil law systems. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2007); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) (comparing investment environments in civil and common law countries).

15. LoPucki & Weyrauch, *supra* note 2, at 1427.

16. Mnookin & Kornhauser, *supra* note 10, at 956. Law and economics scholars also advise courts against finding liability for a wide range of strategic behavior which might be construed as anticompetitive or predatory. *See* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 272 (1981) (explaining that firms will not generally engage in predatory pricing unless barriers to entry are high).

17. Private ordering, in contrast to public ordering, refers to the processes by which parties create their own legally enforceable commitments. Mnookin & Kornhauser, *supra* note 10, at 950. This Article will deal with examples of strategic behavior in both private and public realms.

to appropriate legal and business behavior from an ethical and economic perspective.

Prior literature has examined anticompetitive sham litigation.[18] However, strategic legal bullying encompasses a greater range of anticompetitive behavior than this limited activity. For example, sham litigation involves asserting a baseless claim during administrative or judicial proceedings.[19] In contrast, strategic legal bullying asserts or frivolously *defends* a baseless legal position to derive advantage by exploiting the high cost of the legal system as a barrier to seeking a remedy.[20]

For example, as discussed below, the practice of efficient patent infringement occurs when a company exploits the weak deterrent effects of the patent laws to appropriate technology, weaken competitors, and increase profits.[21] Companies with ample financial resources can thus exploit the financially weak position of start-up companies and independent inventors by knowingly appropriating their patented technologies. This activity does not amount to sham litigation, yet it falls within the broader umbrella of strategic legal bullying since the party that commits the efficient infringement denies the existence of their opponent's patent and exploits the high costs of litigation to get away with their unauthorized use of the smaller party's technology.[22] Various other legal tactics that fall

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18. *See* Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 608 (1992); Smith, *supra* note 13; KLEIN, *supra* note 3; Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 39–71 (1980).

19. Myers, *surpa* note 18.

20. *See* Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, N.Y.L. SCH. L. REV. 345, 348 (2006) (discussing how the real crisis in tort litigation is "defendants who assert frivolous defenses, abuse procedure, file hopeless appeals . . . all to discourage legitimate claims and delay payment"). In the United States each party pays their own litigation costs and attorney's fees under what is referred to as the "American rule." Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 731 (2010) ("Under the American Rule, the prevailing party is ordinarily not entitled to collect attorney's fee from the loser.").

21. *See* Eric C. Wrzesinski, *Breaking the Law to Break into the Black: Patent Infringement as a Business Strategy*, 11 INTELL. PROP. L. REV. 193, 194–95 (2007) ("[P]atent infringement may remain an effective business strategy for technology-producing firms, even when not employed willfully, due to the inadequate deterrence function of current U.S. patent laws.").

22. Other examples of strategic legal bullying that go beyond sham or frivolous litigation are discussed below; for example, anticompetitive con-

outside of sham litigation will be discussed below as examples of strategic legal bullying.[23]

Evidence suggests that strategic legal bullying is commonplace and has serious harmful consequences.[24] Take the case of large multinational corporation Unilever, owner of the Hellman's brand of mayonnaise, and how they targeted a small company called Simply Mayo for its use of the word "mayo" to describe its vegan mayonnaise substitute. Unilever filed a Lanham Act claim against the much smaller competitor and alleged unfair competition, arguing that the use of the word "mayo" is deceptive since mayonnaise must, as they claim, contain eggs.[25] Eventually, after a wave of negative publicity, Unilever agreed to withdraw their suit.[26] Unilever's initial goal was to seek an injunction that would have forced the smaller company to engage in a costly rebranding process.[27]

The remainder of this Article will proceed as follows: Part I examines the antecedents of law and strategy and assesses law and strategy from an economics perspective to contrast legitimate and illegitimate examples of legal strategy. Within this context, strategic legal bullying is identified as an illegitimate business activity assessed in relation to the economic concepts of rent-seeking, public–private ordering, transaction costs, and

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tracting, employment wage theft, and employment misclassification. *Infra* notes 113–94 and accompanying text.

23. *See infra* notes 113–94.

24. *See* Myers, *supra* note 18 (stating that the amount of sham litigation cases is high and is likely to be increasing over time). These cases take a financial and emotional toll on the small parties who are often the targets. *See* Mackensey Lunsford, *E. & J. Gallo Forces Asheville Company to Change Name*, CITIZEN-TIMES (June 27, 2014), http://www.citizen-times.com/story/news/local/2014/06/27/e-j-gallo-forces-asheville-company-change-name/11453713/ (discussing the financial and emotional costs imposed on small business owners dealing with litigation and rebranding efforts). In this case, large wine company E.J. Gallo threatened litigation against Tom Gallo, a small Asheville entrepreneur for his use of GalloLea Pizza Kits. *Id.*

25. *See* David Orozco, *Using Social Media in Business Disputes*, 57 MIT SLOAN MGMT. REV. 33, 33–35 (2016).

26. *Id.* at 34. The defensive techniques used to pressure Unilever amounted to a private ordering solution that counteracted the negative effect of their strategic legal bullying. Simply Mayo's victory appeared to be short-lived since the Department of Agriculture's Egg Board was reviewing whether to limit the use of the word mayo for food products that only included eggs as an ingredient, however, this review was eventually withdrawn.

27. *Id.*

unfair competition. Part II categorizes various strategic legal bullying practices employed in the marketplace as types of rent-seeking behavior. Part III discusses some of the public and private ordering responsive techniques that are available to small companies and individuals and highlights several areas ripe for legal reform. Part IV frames the analysis of strategic legal bullying in relation to ethics, business norms, and corporate social responsibility. Following this, the Article concludes.

I.
A Basic Economic Analysis of Strategic Legal Bullying

A. *Strategic Attorneys*

As a general matter, strategic legal behavior relies on the expert engagement of private and public ordering legal institutions such as contracts,[28] litigation,[29] regulation,[30] adminis-

28. *See* Ronald J. Gilson, Charles Sabel & Robert Scott., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum. L. Rev. 431, 463–67 (2009) (discussing a case involving interlocking contracts to achieve numerous strategic goals); David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 Am. Bus. L.J. 687, 719–20 (2010) (discussing Ticketmaster's exclusivity contracts as a source of competitive advantage).

29. Frank, *supra* note 13; Tom Hinthorne, *Predatory Capitalism, Pragmatism, and Legal Positivism in the Airlines Industry*, 17 Strat. Mgmt. J. 251, 261 (1996) ("A corporate leader can use the adversary system to destroy or weaken an opposing stakeholder . . . ."); Charles T. Graves & Brian D. Range, *Identification of Trade Secret Claims in Litigation: Solutions for a Ubiquitous Dispute*, 5 Nw. J. Tech. & Intell. Prop. 68, 68 (2006) (discussing how plaintiffs strategically engage in vague pleading during trade secret litigation); Orozco, *supra* note 28, at 716 (discussing how Google claims that competitor Microsoft initiates litigation to access the inner workings of Google's technology and strategy).

30. *See* Victor Fleischer, *Regulatory Arbitrage*, 89 Tex. L. Rev. 227, 230 (2010) (discussing how companies strategically structure complex deals to reduce regulatory costs while raising Coasean transaction costs if the regulatory savings outweigh transaction costs and how "[l]arge companies that can afford elite law firms employ more aggressive deal structures that push the regulatory frontier"); Orozco, *supra* note 25, at 34 (discussing how Uber strategically uses social media and its installed user base and apps to crowdsource favorable regulations); Matt Stempeck, *Are Uber and Facebook Turning Users into Lobbyists?*, Harv. Bus. Rev. (Aug. 11, 2015), https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists.

trative processes,[31] and legislation[32] to advance business objectives. A growing body of academic research examines this practice and the role attorneys play as the agents of business strategy and managerial -making.[33] Some of this research examines the role of entrepreneurial attorneys[34] and managers' capacity to develop non-market strategies[35] and the related, knowledge-oriented capability of legal astuteness.[36]

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31. *See* John R. Allison & Starling D. Hunter, *On the Feasibility of Improving Patent Quality One Technology at a Time: The Case of Business Methods*, 21 BERKELEY TECH. L.J. 729, 786–87 (2006) (providing a detailed empirical account of how patent applicants strategically game the technology classification system during the patent application process through creative patent drafting to avoid a more rigorous examination required by the business method technology classification); *see also* Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (defendant car dealers successfully persuaded a regulatory agency to file suit to enjoin a new competitor); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (start-up company's innovative mail order pharmaceutical delivery business was thwarted when a pharmaceutical trade association used litigation and administrative proceedings in a predatory manner).

32. *See* Orozco, *supra* note 25, at 34 (discussing how Tesla strategically crowdsources favorable legislation); *see also* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (defendant railroad companies sponsored legislation that would disadvantage the competing trucking industry).

33. *See* Kevin J. Delaney, *Power, Intercorporate Networks, and "Strategic Bankruptcy"*, 23 LAW & SOC'Y REV. 643 (1989); Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423 (1993); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 699–700 (1996). For research that examines the role of corporate legal strategists, see Bird & Orozco, *supra* note 2 and Orozco, *supra* note 28.

34. *See* Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000).

35. *See* David P. Baron, *The Nonmarket Strategy System*, 37 MIT SLOAN MGMT. REV. 73, 73 (1995) (stating that "[t]he nonmarket environment consists of the social, political, and legal arrangements that structure interactions among companies and their public. For many companies, nonmarket forces have a major impact on performance; hence these forces warrant the same high level of attention in business strategy as do market forces.").

36. *See* Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 379 (discussing how a legal astuteness managerial capability has four components: (1) a set of value-laden attitudes, (2) a proactive approach, (3) the ability to exercise informed judgment, and (4)

LoPucki and Weyrauch's work is an important departure point to examine the central role of strategic attorneys. According to these scholars, strategy presumes a field of play that includes people, data, and things that can be arranged.[37] Attorneys who excel at legal strategy play a paramount role and can greatly impact legal decisions through their expert interaction with decision-makers, facts, legal cultures, and the law.[38] The law itself, in their theory, is just one additional factor that is highly indeterminate and subject to strategic manipulation.[39]

Other research examines the legal environment as an enabler of strategy and proactive legal decision-making with specific business goals in mind.[40] Scholars recognize that the law can be endogenously impacted and shaped by strategic decision-makers.[41] This approach has a strong behavioral compo-

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context specific knowledge of the relevant law and the appropriate application of legal tools).

37. LoPucki & Weyrauch, *supra* note 2, at 1428.

38. *Id.*

39. *Id.* at 1411. According to LoPucki & Weyrauch, legal strategies can be broken down into three main categories that include: strategies that enlist judges, those that pressure or limit judges and those that deprive judges of any say in the case outcome. *Id.* at 1443.

40. *See* Constance E. Bagley et al., *Who Let the Lawyers Out? Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419 (2016); James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework Without Economic Analysis of Law*, 24 CAMPBELL L. REV. 131, 147 (2002) (distinguishing between compliance decision-making that complies with law and public policy and strategic decision-making that ascertains whether business decision-making creates too great a risk of liability under law or public policy); James E. Holloway, *A Primer on the Theory, Practice, and Pedagogy Underpinning and School of Thought on Law and Business*, 38 U. MICH. J.L. REFORM 587, 607 (2005) ("[A] legal-managerial school recognizes that business decisions must be rationally related to the furtherance of organizational objectives."); *see also* SIEDEL & HAAPIO, *supra* note 2.

41. *See* Constance E. Bagley, *The Value of a Legally Astute Top Management Team: A Dynamic Capabilities Approach*, 2 *in* OXFORD HANDBOOK OF DYNAMIC CAPABILITIES (David Teece ed.), http://www.valuewalk.com/wp-content/uploads/2016/07/SSRN-id2811424.pdf; Constance E. Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda*, *in* LEGAL RISK MANAGEMENT, GOVERNANCE AND COMPLIANCE 45–66 (Stuart Weinstein & Charles Wild eds., 2013); Nicholas Argyres & Kyle J. Mayer, *Contract Design as a Firm Capability: An Integration of Learning and Transaction Cost Perspectives*, 32 ACAD. MGMT. REV. 1060, 1061 (2007) (developing a framework to assess the contracting knowledge that resides in various employees); Gary Pisano, *Profiting from Innovation and the Intellectual Property Revolution*, 35

nent where legal and business decision-making is viewed as the product of both economic[42] and psychological factors.[43] In this same vein, legal studies in business scholarship have started to examine the range of strategic legal pathways that are available to firms that employ managers and attorneys.[44]

The assessment of entrepreneurial attorneys promoted by this author calls for the revaluation of the predominant scholarly view that transactional attorneys act as transaction cost engineers.[45] Under this prominent view in the legal academy, transactional attorneys are regarded as efficient facilitators of value-creating transactions, although the opposite is certainly

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RES. POL'Y 1122, 1127–29 (2006) (discussing various case studies of endogenous appropriability regimes related to intellectual property).

42. Applying the logic of rational choice, a business assessing a decision purely on economic grounds will compare the costs and benefits of legal compliance. If the benefits outweigh the costs, these economic actors will engage in strategic non-compliance. *See* Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1262 (1995).

43. *See* Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1413–14 (2002) (discussing that economics assumes rational behavior when that is not always the case and how a behavioral approach that takes biases and irrational behavior into account is a better alternative to assess regulation in the financial services industry).

44. *See* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 11 (2008); Bird & Orozco, *supra* note 2; Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 735 (2010) ("[C]ontract is the most flexible, strategic tool that the law offers to the business community.").

45. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984). This perspective draws from the view among many economists that transaction costs are central to the study of economics. The research that follows this general perspective is labeled transaction-cost economics. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *cf.* Fleischer, *supra* note 30 (calling into question the depiction of attorneys as transaction-cost engineers due to regulatory arbitrage); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 498 (conducting an empirical study on the role of attorneys and finding weak support for the hypothesis that transactional attorneys add value by reducing transaction costs); John Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 U. PA. J. BUS. L. 733, 752–54 (2016) (arguing that the classical economic theory underlying transaction-cost economics minimizes the importance of entrepreneurial activity, making it a poor fit to model law and entrepreneurship activities).

true in cases where attorneys acting in an adversarial setting have been known to strategically raise litigation costs.[46] Certain strategic transactional practices, however, are designed to raise a type of transaction cost known as switching costs to achieve lock-in among key stakeholders.[47] A well-known method to gain competitive advantage is to raise long-term switching costs that strategically lock-in customers, employees, and suppliers.[48] For example, a buyer may lock-in a key supplier by inducing the supplier to contractually agree to make costly and irreversible investments in production processes and equipment that are highly specialized and tailored to the buyer's specific needs.[49] This raises the supplier's switching costs relative to other buyers and achieves supplier lock-in. Alternatively, a manufacturer may extend the value of their patent by lowering the product price to create brand loyalty, thus raising the buyer's switching costs after the patent expires.[50] In addition to raising switching costs and creating lock-in among key parties, these strategic business and legal tactics raise competition costs and impose network externalities by creating barriers to entry.[51]

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46. LoPucki & Weyrauch, *supra* note 2, at 1457–61 (discussing delay strategies in litigation); Mnookin & Kornhauser, *supra* note 10, at 986; Myers, *supra* note 18, at 589–96 (stating that a reason parties engage in predatory litigation is to raise competitors' litigation costs and other market costs such as delayed or deterred market entry).

47. CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 11–13 (1998) (discussing the role of switching costs in information goods that make it difficult for a technology user to switch to a competing technology or product).

48. *See* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 458, 485 (1992). In that case, Kodak implemented a policy of selling patented Kodak parts only to customers that obtained after-market servicing and repairs from Kodak, rather than independent service operators. This practice effectively locked-in customers for Kodak's servicing business but was found to be a violation of antitrust laws.

49. *See* Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 2, 233, 240 (1979) (recognizing that lock-in and switching costs can increase due to human capital investments such as specialized training).

50. Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1460–61 (2002).

51. For example, Ticketmaster, Inc. uses exclusivity contracts with major venues to create lock-in and switching costs that raise significant barriers to entry for any potential new entrant in the ticket servicing business. *See* Orozco, *supra* note 28, at 720.

The prevailing scholarly view of attorneys as transaction cost engineers is accurate insofar as it describes how attorneys lower transaction costs to facilitate short-term transactions. Corporate legal strategists, on the other hand, are a subset of attorneys who excel at using legal means to strategically *raise* long-term switching costs among key stakeholders.[52] These strategic attorneys can also raise transaction costs during contracting, litigation, legislative processes, or administrative proceedings when it furthers business objectives.[53]

The rise of in-house legal counsel plays a role in the increased use and sophistication of corporate legal strategy.[54] Chief legal counsel within corporations increasingly seek to reduce the amount of legal expense devoted to external legal counsel.[55] They also increasingly look for ways to use the law to create value and gain prominence within the company's executive suite.[56] In this capacity, in-house legal counsel become regarded by other executives as a source of strategic business advice in addition to legal counsel.[57]

The strategic business dimensions of lawyering, however, have not been well-appreciated in legal education or scholarship due to the prevailing view of attorneys as transaction cost

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52. *Id.* at 713; DiMatteo, *supra* note 44, at n.165.

53. FRANK, *supra* note 13; Fleischer, *supra* note 30, at 236.

54. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760, 778 (discussing how the rise of in-house lawyers leads to greater specialization and less reliance on the reputational capital of big law firms); Leslie Brokaw, *Is it Time to Hire a Chief Legal Strategist?*, MIT SLOAN MGMT. REV. (Dec. 30, 2014), http://sloanreview.mit.edu/article/is-it-time-to-hire-a-chief-legal-strategist/.

55. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM, 50 (1991) ("[I]n their relationship with outside law firms, today's enlarged corporate legal departments imposed budgetary restraints, exert more control over cases, demand periodic reports, and engage in comparison shopping among firms."); John P. Heinz et al., *The Scales of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANN. REV. SOC. 337, 347–48 (2001) (discussing how the increased complexity of the in-house attorney's role within a corporation reduced the status and role of external legal counsel).

56. *See* Nelson & Nielsen, *supra* note 34, at 465, 482; Marcos A. Mendoza, *Which One Are You: Cop, Counsel or Entrepreneur?* CORP. COUNS., http://www.corpcounsel.com/id=1202738587150/Which-One-Are-You-Cop-Counsel-or-Entrepreneur?mcode=1202615625483&curindex=0.

57. Nelson & Neilsen, *supra* note 34, at 481–83.

engineers.[58] That viewpoint correctly emphasizes attorney's ability to reduce transaction costs to achieve short-term transactional efficiency and increase social welfare.[59] This Article proposes an expanded view of entrepreneurial transactional attorneys who facilitate corporate legal strategy.[60] Attorneys who excel at implementing corporate legal strategy may certainly behave like transaction cost engineers. What differentiates them, however, from the majority of attorneys is their ability to use legal means to raise switching costs and other transaction costs that further their client's long-term strategic business objectives.[61]

Attorneys who raise transaction costs and align themselves too closely with their clients' business interests may be perceived as unscrupulous "hired guns."[62] A vigorous debate has taken place among those who consider hired-gun attorneys as injurious to the legal profession and the professionally independent, lawyer–statesman ideal.[63] One can certainly be a legal strategist, however, without acting like a hired gun. This would involve respecting professional norms and ethical rules of attorney conduct.[64] It would also involve drawing a line with respect to behavior that lowers social welfare and that violates important business norms, as occurs in cases of strategic legal bullying.[65] On the other hand, those attorneys who disregard professional ethics to advance their clients' narrow business interests behave like hired guns and are likely to be the type of attorneys who enable strategic legal bullying.[66]

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58. *See* Gilson, *supra* note 45.

59. *Id.*

60. *See* Wroldsen, *supra* note 45, at 761–62.

61. *See* Bagley, *supra* note 36; Bagley & Roelling, *supra* note 41 (arguing legal capabilities can be a source of strategic advantage).

62. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (discussing the decline of the lawyer–statesman ideal and how this ideal is challenged by those who are primarily motivated by self-interest rather than citizenship).

63. *Id.*

64. *See* Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153 (2013).

65. *Id.*

66. *See* Kath Hall & Vivien Holmes, *The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically* 11 LEGAL ETHICS 137 (2008); Kimberly Kirkland, *Ethics in Large Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 634 (2005).

The strategic use of the law to raise switching costs should be permissible, to an extent. For example, the strategic use of contract exclusivity terms may enable parties to commit to one another, build trust, and facilitate productive investments that otherwise would not be made.[67] Such strategic contracting should be permissible as a social welfare-enhancing activity.[68] Raising a buyer's switching costs, for example, can be a social welfare-enhancing activity.[69] In other cases, raising transaction costs in both private and public ordering contexts is socially wasteful since it subverts the notion of efficient market transactions.[70] In its most pernicious form, corporate legal strategy lowers social welfare and crosses into the domain of rent-seeking.[71]

B. *Rent-Seeking*

Rent-seeking activities employ scarce resources to transfer wealth from others instead of using those resources to create new wealth.[72] Rent-seeking may involve wealth transfers solely

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67. DiMatteo, *supra* note 44, at 736 (discussing the case of a contractor and a subcontractor crafting a number of agreements as "an example of strategically bundling contracts" and as a means to "gradually build a strategic alliance through the sequencing of a number of discrete contracts followed by an agreement for continuing collaboration"); R. Preston McAfee & Marius Schwartz, *Opportunism in Multilateral Vertical Contracting: Nondiscrimination, Exclusivity, and Uniformity*, AM. ECON. REV., Mar. 1994, at 210, 225 (discussing exclusivity terms as a contractual means to reduce opportunism among contracting parties); Steven R. Salbu & Richard A. Brahm, *Strategic Considerations in Designing Joint Venture Contracts*, 1992 COLUM. BUS. L. REV. 253, 296–302 (strategic contract terms such as incentive clauses help minimize opportunism in joint ventures).

68. Salbu & Richard, *supra* note 67, at 296–302.

69. Parchomovsky & Siegelman, *supra* note 50, at 1474–81 (combining utility patents with trademarks to create brand loyalty does not generate any social deadweight losses).

70. WILLIAMSON, *supra* note 45; Coase, *supra* note 45.

71. KLEIN, *supra* note 3, at 20 ("[F]raudulent or strategic litigation among competitors may be motivated by rent-seeking . . . .").

72. James M. Buchanan, *Rent-Seeking and Pro?t-Seeking*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3, 7–8 (J.M. Buchanan, R.D. Tollison & G. Tullock eds., 1980). I greatly appreciate David Haddock's recommendation to consult this source. *See also* Johann G. Lambsdorff, *Corruption and Rent-Seeking*, *in* 113 PUBLIC CHOICE 97, 100 (2002); Robert D. Tollison, *Rent Seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE 506, 506 (Dennis C. Mueller ed., 1997) (defining rent-seeking as the "socially costly pursuit of wealth transfers").

among private parties, for example in cases that involve theft or charity.[73] The state often plays a key role since it defines laws and property rights that mandate or enable rent-seeking.[74] Rent-seeking activities are often socially wasteful due to the presence of transfer costs.[75] A transfer cost attaches to rent-seeking behavior when the state or a party has to expend resources to obtain, maintain, or prevent others from obtaining a rent.[76] For example, a company that seeks to enact or maintain a regulation that transfers wealth has to hire lobbyists and make political contributions.[77] In a purely private context, purchasing locks to protect property is a socially wasteful transfer cost that is necessary to prevent the rent-seeking behavior called theft.[78] Strategic legal bullying is a form of rent-seeking since it relies on a baseless legal position and exploits the inherently high costs of the legal system to transfer and extract wealth from the legal bullying target.[79] The transfer costs related to strategic legal bullying involve attorney's fees, court fees, the time managers must devote to legal matters, and the societal expense of maintaining a judicial and enforcement apparatus to resolve this costly behavior.

From an economic standpoint, legal bullying frequently occurs because it is effective and rational to engage in this

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73. Lambsdorff, *supra* note 72, at 100.

74. E.g. taxes, subsidies, quotas, license monopolies, regulation. *Id.* at 101.

75. *Id.* at 100 ("Expenses for enacting regulation in industry are another example for transfer costs, including salaries to lawyers and lobbyists.").

76. The seminal work on transfer costs in relation to rent-seeking was developed by Gordon Tullock. *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, (1967).

77. *See* Richard L. Hasen, *Lobbying, Rent-Seeking and the Constitution*, 64 STAN. L. REV. 191, 228–31 (2012) (discussing how lobbying is a form of rent-seeking since it is purely redistributive and diverts economic resources away from value-creating activities.); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13 (1971) (discussing how the content of lobbyist-derived regulation and legislation are likely to be inefficient).

78. Lambsdorff, *supra* note 72.

79. *See* Balmer, *supra* note 18, at 63 ("While the additional costs of doing business imposed on a smaller firm by a dominant firm's predatory pricing or territorial allocation policy may reduce profits and eventually squeeze the small firm out of the market, the added costs bear at least some relation to the firm's sales or share of the market. . . . Predatory litigation, on the other hand, imposes high fixed costs, which are independent of a firm's market position.").

practice, albeit highly unethical.[80] Take the case of trademark bullying, which occurs when a large company asserts a weak trademark claim against a smaller party.[81] A simple economic model explains why some large companies become trademark bullies and the following case offers insight into the matter. The large fast food service operator Chik-fil-A created the valuable phrase "Eat Mor Chikin" and protected it with a slogan trademark.[82] A much smaller company, which is not even a direct competitor, applied to register their "Eat More Kale" mark.[83] Even though the probability of success is very low for Chik-fil-A to win a dubious trademark infringement claim, it is still rational and beneficial for them to oppose the small company's trademark registration after taking litigation costs into account.[84] As long as the expected value from litigation (value of the Eat Mor Chikin brand multiplied by the probability of success) is higher than the litigation costs, it is rational to oppose the new Eat More Kale mark, which is what transpired in this case.[85] It is, therefore, economically rational for large companies with high-value assets to engage in strategic trademark bullying since the expected value often exceeds litigation costs.[86]

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80. *C.f.* Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211 (2014) (discussing legal bullying as a form of irrational behavior due to several biases such as the endowment effect).

81. Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 853, 854 (2012); DEP'T OF COMMERCE, TRADEMARK LITIGATION TACTICS AND FEDERAL GOVERNMENT SERVICES TO PROTECT TRADEMARKS AND PREVENT COUNTERFEITING, at 15 (2011), http://www.uspto.gov/ip/TMLitig ationReport_final_2011April27.pdf.

82. EAT MOR CHIKIN, Registration No. 2,010,233. This factual scenario is drawn from an actual trademark dispute.

83. EAT MORE KALE, Registration No. 4,795,440.

84. The claim is dubious since the likelihood of confusion factors point to a weak case and the mark is not diluted since it is not famous. *See In re* E. I. du Pont de Nemours & Co., 476 F.2d 1357, (C.C.P.A. 1973) (listing thirteen likelihood of confusion factors). Chik-fil-A actually opposed the Eat More Kale mark. *See* Orozco, *supra* note 25.

85. Issues that involve higher stakes have a much higher chance of being litigated. POSNER, *supra* note 14, at 600.

86. *See* Myers, *supra* note 18, at 602–07 (developing a formal economic model of predatory litigation that takes into account litigation costs and probability of victory and how the model asymmetrically benefits large companies versus small companies).

Although scholars view trademark bullying as a socially wasteful practice, this crude economic model suggests that might not always be the case. As long as the parties have resources to submit their legal claims, tenuous as they may be, for a decision on the merits, this behavior allows the parties to price the risk of losing or reaching a settlement by assessing their respective properties, valuations, and risk preferences.[87] What makes this model quickly begin to lose credibility in practice is the high cost of litigation.[88] This becomes an important factor in the strategic decision-making process since the bullying target is unable to finance its day in court. Knowing this, the larger company can discount the cost of litigation since a quick and favorable settlement is likely to occur.

In practice, the resource-rich party can use the high cost of litigation advantageously as a strategic factor to decide whether to pursue a claim.[89] The model breaks down since the litigation cost cannot be borne by the smaller party. In these cases, the odds of winning increase to one hundred percent regardless of the legal merits of the case. When one party exploits this scenario by advancing or defending a baseless legal position it is appropriate to label the behavior as strategic legal bullying and rent-seeking.[90] Otherwise, rational actors who appear to be legal bullies are not as long as both parties have adequate information and can finance litigation.

Strategic legal bullies exploit the legal system's high transaction and transfer costs, most notably court filing and attor-

87. *See* Mnookin & Kornahuser, *supra* note 10, at 968–74.

88. Proceeding to a jury verdict is notoriously expensive. For example, according to the American Intellectual Property Law Association (AIPLA), the average cost of a jury trial for a patent infringement lawsuit ranges between $970 thousand and $5.9 million, depending on the amount of damages at stake. AIPLA, 2013 REPORT OF THE ECONOMIC SURVEY (2013).

89. KLEIN, *supra* note 3, at 16–17.

90. Strategic legal bullying is broader than sham or predatory litigation since in many cases the strategic legal bully does not initiate a lawsuit, and in some cases is the defendant. They still, however, abuse the high costs of the legal or regulatory system to their advantage. In cases that involve sham or predatory litigation the predator is almost always the plaintiff and the target is normally the defendant. *See* Myers, *supra* note 18, at 597. The literature on sham litigation likewise recognizes that strategic litigation that is predatory seeks to achieve a goal collateral to wining a judgment on the merits. *See* KLEIN, *supra* note 3, at 10.

ney's fees.[91] They also exploit the knowledge and learning costs associated with litigation. Strategic legal bullies are habitual users of the litigation process and have deep levels of knowledge and expertise with respect to the legal system and its complex, arcane procedures.[92] The costs of learning the complex technical procedures used by legal bullies can be inordinate to the small inexperienced parties that are the customary targets of legal bullying.[93] Strategic legal bullies knowingly exploit this information asymmetry.

Strategic legal bullies often raise financial and information transfer costs against those who are ill-equipped to bear them.[94] For example, a strategic legal bully would file their case in a remote jurisdiction, file multiple claims and counterclaims, and file numerous motions and requests for hearings on diverse matters such as changes in venue, jurisdiction, appeals, and claims for attorney's fees.[95] They may also strategically delay the case to weaken the opponent's evidentiary standing.[96] In the context of legal bullying, these rent-seeking activities impose transfer costs, greatly weaken the small party's

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91. Myers, *supra* note 18, at 597 n.150.

92. *See id.* 599 (discussing how predatory litigators may achieve economies of scale through their repeated use of the legal system to great disadvantage of smaller inexperienced parties). In the case of Chik-fil-A, the company had sent thirty cease-and-desist letters to other small companies before it had sent its letter to Eat More Kale.com. *See* Cease-and-Desist Letter from Auma N. Reggy, Attorney, Arnall, Golden, Gregory, L.L.P., to Daniel P. Richardson, Attorney, Tarrant, Gillies, Merriman & Richardson (Oct. 4, 2011) (on file with author).

93. *See* Balmer, *supra* note 18, at 63–64 (discussing how the costs of sham litigation inordinately fall on smaller inexperienced players such as small businesses).

94. For example, the larger party may file a motion to remove the case to their home jurisdiction.

95. *See, e.g.*, Vermont v. MPHJ Tech. Invs., LLC, 803 F.3d 635, 638 (Fed. Cir. 2015) (defendant patent troll removed the case from state court twice to the U.S. district court and filed multiple appeals on adverse rulings of law related to the pleadings).

96. *See* LoPucki & Weyrauch, *supra* note 2, at 1460 ("The fact that delay affects case outcomes is widely recognized. What is not widely recognized is the capacity of legal strategy to manipulate the extent of delay."); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 Am. Bus. L.J., 487, 505–06 (2009) (discussing how delay can affect the chances of winning a claim and how various tactical delays exist, such as pretrial motions, challenges to jurisdiction, and delayed discovery).

negotiating power, and greatly increase the likelihood of a settlement advantageous to the legal bully.[97] Strategic legal bullying imposes additional social costs since it increases the chance that a baseless legal claim will be successfully asserted against multiple targets and used to stifle the innovation and efficiency that results from competition. The practice casts a long detrimental shadow on the law since others will be dissuaded from engaging in productive economic activity as a result of faulty or sham precedent.[98]

C. *The Legal Entitlement Frontier*

Private parties bargain in the shadow of the law.[99] The law, however, is hardly ever precise and in most cases the legal issue is uncertain with many possible outcomes or interpretations.[100] Strategic legal bullying compounds this problem by overreaching on the basis of weak or non-existent claims and illegitimately extends the shadow of the law into impermissible territory. The practice extends the law near or beyond the point where legal entitlements are valid, i.e., a "legal entitlement frontier," and has a chilling effect on future legitimate business practices.[101]

For example, the Eat Mor Chikin mark would be asserted as a valid property entitlement and have a high chance of being successfully asserted on the merits against a direct competitor's use of the correctly spelled Eat More Chicken mark. When Eat Mor Chikin was litigated against Eat More Kale,

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97. *See* Mnookin & Kornhauser, *supra* note 10, at 972 ("The party better able to bear the transaction costs, whether financial or emotional, will have an advantage in divorce bargaining."); Myers, *supra* note 18, at 591 ("[A]nother way in which predatory litigation can raise rivals' costs is through onerous or burdensome settlement terms. A rival may agree to settle a case, paying lump sum damages or a stream of payments, rather than bear the burden and expense of defending the strike suit.").

98. For example, Chik-fil-A was successful in using the same trademark bullying strategy against thirty small companies prior to the Eat More Kale case. Cease-and-Desist Letter from Auma N. Reggy, *supra* note 92. As far as the author can tell, "sham precedent" is a novel term. As it is used here it refers to the deceitful practice of asserting a baseless legal position that increases its persuasive powers the more often it is successfully asserted against weak parties who lack the means to challenge it in court.

99. *See* Mnookin & Kornhauser, *supra* note 10, at 997.

100. *See id.* at 969; LoPucki & Weyrauch, *supra* note 2, at 1413.

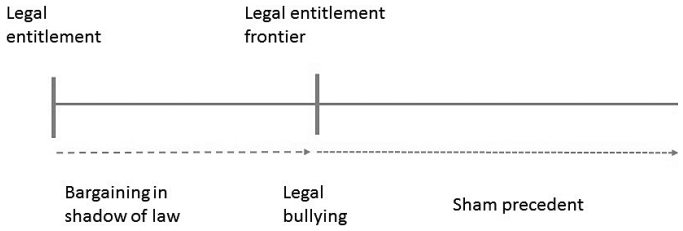
101. *See* Cease-and-Desist Letter from Auma N. Reggy, *supra* note 92.

however, this occurred near Chik-fil-A's legal entitlement frontier since the probability of winning was fairly low, although not zero percent.[102] If Eat Mor Chikin was asserted against the totally unrelated financial services mark—"What's in your wallet?"—it is fair to say that at that point Chik-fil-A crossed its legal entitlement frontier and had a near zero chance of winning under the likelihood of confusion test in trademark law.[103]

When strategic legal bullies assert claims near or beyond the legal entitlement frontier, their target is placed in a weak position since it has to exit the market or bargain within the shadow of rights that have been wrongfully extended.[104] Since each case is unique, good judgment is necessary to decide whether the bully's position is baseless and amounts to legal bullying. In some cases, a baseless legal position is extended multiple times in future cases. At this point, the bully creates the illusion of a valid claim through what is labeled here as "sham precedent." The illusion of sham precedent can have a snowball effect since it becomes stronger each time a target capitulates.[105] As an egregious form of rent-seeking and legal abuse, the use of sham precedent has severe negative economic consequences since it deters what would be otherwise productive economic activity and competition.

Figure 1 below illustrates these relationships.

FIGURE 1.



102. The U.S. Patent and Trademark Office denied Muller-Moore's Eat More Kale application on likelihood of confusion grounds; however, it had twice reached the opposite conclusion during the trademark prosecution process.

103. *See In re* E. I. du Pont de Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973) (listing thirteen likelihood of confusion factors).

104. Mnookin & Kornhauser, *supra* note 10, at 968–69.

105. *See* Cease-and-Desist Letter from Auma N. Reggy, *supra* note 92.

As an unethical and illegitimate practice, strategic legal bullying also damages the public's perception of the law as an enabler of justice. In our market-based economy, justice in the business context is closely related to the notion of fair competition as operationalized by the adherents of the Chicago School of law and economics ("Chicago School"). Reduced to a maxim, the Chicago School promotes judicial rules and doctrines that advance economic efficiency, or maximum social welfare.[106] The Chicago School is skeptical of the government's ability to promote these aims with respect to private market behavior when transaction costs do not impede private bargaining.[107]

For example, the Federal Trade Commission (FTC) recently issued guidelines related to how it would enforce unfair competition claims. The FTC defined unfair competition as "an act or practice that (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies."[108] As part of its guidelines in prosecuting unfair competition, the FTC adopted a Chicago School approach since it declared that it "will not consider non-economic factors, such as whether the practice harms small business or whether it violates public

106. *See* POSNER, *supra* note 14. The Chicago School's influence on the law has been significant and pervasive. Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CALIF. L. REV. 815, 821 (1990) ("The stated methodology of Chicago School law and economics is at once legal positivism and economic positivism. Positive economic analysis of law seeks to identify a legal rule and then make one or more descriptive statements about the economic effects of that rule.").

107. U.S. competition law from the Chicago School perspective was summarized by Judge Frank Easterbrook as "a profoundly skeptical program" that is comprised of "little other than prosecuting plain vanilla cartels and mergers to monopoly." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986). Also, Chicago School scholars "typically propose the attainment of economic efficiency to be the exclusive basis for the design and application of antitrust rules." William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 22.

108. Statement of Joshua D. Wright, Commissioner of the Fed. Trade Commission (June 19, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

morals, in deciding whether to prosecute unfair methods of competition."[109]

The analysis of unfair or anticompetitive behavior from the Chicago School perspective assesses behavior in relation to its effects as opposed to any intrinsic notions of fairness, morals, or justice.[110] Many of the strategic legal bullying practices outlined in this article should be deemed impermissible per se from an intrinsic fairness or ethical perspective; however, these practices are also detrimental from the Chicago School's perspective because they exploit transfer costs and reduce social welfare as a type of rent-seeking behavior. In practice, however, strategic legal bullying is seldom regulated since that would require a judicial assessment of the legal bullying practice. The vast majority of legal bullying cases never reach a decision on judicial merits because the targets lack financial means to obtain judicial redress.

A potential remedy offered by economic analysis is to develop judicial rules and doctrines that lower transaction costs. The U.S. litigation system has been continually vexed, however, by high transaction costs, delay, and uncertainty.[111] These intractable aspects of the legal system pose a major barrier for many to access the legal system and obtain justice.[112]

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109. *Id.* As a form of rent-seeking, strategic legal bullying would be classified as a form of unfair competition within the FTC's definition. The U.S. Supreme Court also espouses the Chicago School perspective of efficiency in important antitrust decisions, adopting the Chicago School viewpoint on predatory pricing in antitrust. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."). In contrast, judges that operationalize unfair competition cases outside of a law and economics approach base their reasoning and doctrines on the "rules of fair play," the "morals of the marketplace," and the "principles of honesty and fair dealing." *See* Smith, *supra* note 13, at 1123.

110. For example, economists often take issue with judicial application of the unconscionability doctrine in contract law. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293–315 (1975) (arguing in favor of an unconscionability doctrine with much more limited scope to facilitate efficient contract terms).

111. *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 2 (2012) ("[O]ne of the most significant problems faced by the legal profession in the twenty-first century is the ineffective delivery of legal services. . . . Lawyers are out of reach for most individuals unless they enjoy extreme affluence or subsist at poverty levels.").

112. *Id.*

The following Part will examine various cases where strategic legal bullies exhibit rent-seeking behavior.

II.
Cases of Strategic Legal Bullying

This Part will discuss strategic legal bullying practices as defined earlier in the areas of employment, intellectual property, commercial speech, business regulation, and anticompetitive behavior. Prior discussions of abusive legal behavior have focused on sham litigation.[113] As this Part demonstrates, strategic legal bullying encompasses a much broader set of activities than what has been previously recognized.

A. *Employment*

Some employers use their legal expertise, resources, and bargaining power to write employment contracts with oppressive, unenforceable terms. These terms amount to legal bullying since they are not enforceable, yet they are successfully asserted against employees who are typically unsophisticated and who face the threat of expensive and protracted litigation. An example of an employer engaging in this practice is fast food operator Jimmy John, whose employment contracts with its sandwich makers and delivery drivers include non-compete terms as a standard employment provision.[114] Most scholars agree that these non-compete terms are not enforceable since they fail to protect a legitimate business interest and are unreasonable in their scope.[115] These contracts are unreasonable since they broadly define a competitor as any establishment that earns at least ten percent of its revenues from sandwiches and is within two miles of an existing Jimmy John's location.[116]

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113. *See* Myers, *supra* note 18.

114. *See* Mitch Lipka, *This Jimmy John's Labor Practice is Drawing Fire*, CBS News (Dec. 23, 2014, 4:42 PM), http://www.cbsnews.com/news/jimmy-johns-employee-non-compete-clause-reportedly-target-by-ny-attorney-general/ (reporting that the New York Attorney General is investigating the covenants and believes that they raise "serious concerns regarding the legality" of the agreement).

115. *See* Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 Ind. L.J. 979 (2012) (discussing the legitimate business interests in enforceable non-compete clauses as they relate primarily to knowledge-based rights).

116. *See* Lipka, *supra* note 114.

The harm in this case is incurred by employees, competitors, and consumers.

Another example of legal bullying in the employment area involves wage theft. Wage theft occurs when an employer fails to pay the required state or federal minimum wage and fails to meet overtime pay requirements.[117] This practice is fairly common and harms low-wage workers significantly.[118] Some firms raise the cost of reporting wage theft complaints by exploiting the legal knowledge asymmetry between the company and its low-wage workers.[119] Companies also engage in legal bullying when they threaten retaliation if a worker takes action or complains about wage theft.[120] In these cases, companies create a hostile environment for anyone who might submit a claim and indirectly signal that an employee who files a claim will suffer negative repercussions.[121]

Legal bullying in the workplace also occurs when employees are intentionally misclassified as independent contractors.[122] Misclassification occurs when an employer classifies a worker as an independent contractor when the law would categorize them as employees.[123] This practice deprives an employee of legally mandated benefits, wages, and protections afforded under various safety and anti-discrimination statutes.[124]

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117. *See, e.g.*, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft: Testimony Before the Comm. on Educ. & Labor,* 111th Cong. 1 (2009) (joint statement of Gregory D. Kutz, Managing Director & Jonathan T. Meyer, Assistant Director, Forensic Audits & Special Investigations).

118. *Id.* at 23; Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1085 (2014) ("[T]hirty percent of tipped workers had not been paid lawfully, and 70% of workers who had worked beyond their scheduled shift were not paid for this extra working time.").

119. *See* Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013).

120. *Id.*

121. Alexander & Prasad, *supra* note 118, at 1089.

122. CHARLOTTE ALEXANDER & ANNA HALEY-LOCK, NOT ENOUGH HOURS IN THE DAY: WORK HOUR INSECURITY AND A NEW APPROACH TO WAGE AND HOUR REGULATION 2–3 (2013).

123. Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. (forthcoming 2017).

124. *Id.* at 2.

According to studies, misclassification is prevalent and mainly harms female workers and workers of color.[125]

For example, several cases have settled where professional football clubs have been sued by cheerleaders who claimed that they were misclassified and denied minimum wage and overtime pay.[126] In one of these cases, the cheerleaders had signed contracts that classified them as independent contractors even though they were subject to significant control by their employers, underwent humiliating treatment, and were subjected to long work hours at very low pay.[127] In another egregious case, a subcontractor required construction workers to become members of a limited liability company to avoid employee classification.[128]

Another type of legal bullying intends to silence whistleblowers with overly-broad confidentiality agreements.[129] Recently, the Securities and Exchange Commission (SEC) settled a case with a company that made employees sign confidentiality agreements that required them to notify the company of any external communications related to whistleblowing prior to communicating with the external party.[130] According to the SEC, this practice violates section 21F of the Dodd–Frank Act[131] and would stifle whistleblowers' reports of

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125. *Id.* at 5–18; *Wage and Hour Division's Complaint*, *supra* note 117.

126. *See* Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. DAVIS L. REV. 123, 125–26 (2015) (discussing several cases where cheerleaders sued professional sports teams for wage misclassification).

127. *See* Complaint at 12–13, Jaclyn S. v. Buffalo Bills, Inc., No. 804088/2014 (N.Y. Sup. Ct. Apr. 22, 2014).

128. Press Release, U.S. Dep't of Labor, Paul Johnson Drywall Inc. Agrees to Pay $600,000 in Back Wages, Damages & Penalties Following U.S. Labor Department Investigation (May 19, 2014), http://www.dol.gov/opa/media/press/whd/WHD20140827.htm (discussing the unlawful classification of LLC members as employees).

129. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 169–73 (1998).

130. Scott Higham, *SEC Says Confidentiality Agreements May Have 'Muzzled' Whistleblowers at Top Government Contractor*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/04/01/sec-says-major-federal-contractor-tried-to-intimidate-and-muzzle-whistleblowers/?postshare=8211447356425220&tid=SS_tw.

131. The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 21(f) (2010).

illegal conduct to regulators.[132] These abusive confidentiality agreements can have a chilling effect on whistleblowers since they state that the failure to comply with the terms could lead to disciplinary action or termination.[133] These clauses also stifle the legislative intent behind many of the whistleblowing statutes, which offer rewards or bounties as a means to encourage whistleblowing.[134]

B. *Intellectual Property*

The field of intellectual property is prone to various cases of strategic legal bullying as well. In the trademark arena, large companies have been known to bully small innovative competitors by aggressively asserting weak trademark claims.[135] The Simply Mayo and Eat More Kale cases discussed earlier are just a few instances of this behavior. The outcome of these cases typically results in the smaller entity agreeing to the larger company's demands, which involve some kind of costly cease-

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132. To implement section 21F of the Dodd–Frank Act, the SEC implemented Rule 21F-17, which states: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." 17 C.F.R. § 240.21F-17 (2011).

133. The language in the confidentiality agreement in this case stated:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

KBR, Inc., Order Instituting Cease-and-Desist Proceedings Pursuant to section 21C of the Securities and Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (Securities & Exchange Commission Apr. 1, 2015), https://www.sec.gov/litigation/admin/ 2015/34-74619.pdf.

134. *See* Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1033–45 (2015) (discussing the federal securities laws and their use of bounties to promote whistleblowing).

135. Manta, *supra* note 81; DEP'T OF COMMERCE, TRADEMARK LITIGATION TACTICS AND FEDERAL GOVERNMENT SERVICES TO PROTECT TRADEMARKS AND PREVENT COUNTERFEITING (2011), http://uspto.gov/ip/TMLitigationReport_final_2011April27.pdf.

and-desist activity such as rebranding or withdrawing from the market.[136]

In the patent arena, non-practicing entities, or "patent trolls," can at times behave like legal bullies.[137] This is true when they target small entities such as start-up companies, small businesses, or non-profits.[138] According to one scholar, start-up companies are often the targets of patent troll suits, and many small company targets settle these weak claims because they cannot afford to fight them.[139] These large companies target smaller companies and employ legal harassment tactics as a method to gain strategic advantage.[140]

A recent case in Vermont highlights the abusive tactics that patent bullies employ.[141] As alleged in that case, a patent troll operated through various shell companies and repeatedly sent letters to small businesses and non-profit entities to solicit payment for the alleged infringement of very broad software patent claims.[142] These claims were based on patents that had been voluntarily dismissed from litigation by the patent holder in previous cases.[143] The letters threatened litigation nonetheless and attached draft complaints even though the company had never filed a patent infringement lawsuit in Vermont and had settled a nominal amount of cases for an average amount of less than $900.[144]

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136. *See* Kiser, *supra* note 80, at 219–20 (discussing the costs imposed on trademark bullying targets that include destroying inventory and packaging, changing advertisement materials, reincorporating with a different name, and the loss of goodwill); Lunsford, *supra* note 24.

137. *See* David Orozco, *Administrative Patent Levers*, 117 PENN. ST. L. REV. 1, 9 (2012).

138. Colleen V. Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 477–78 (2014).

139. *Id.*

140. *See* Smith, *supra* note 13, at 1099–1102 (discussing several examples of large companies targeting small companies with baseless patent and trade secret claims to achieve anticompetitive results).

141. Consumer Protection Complaint, State of Vermont v. MPHJ Tech. Invs., LLC, No. 282-5-13Wncv, 2014 WL 5795264 (Super. Ct. Vt. May 8, 2013), http://www.atg.state.vt.us/assets/files/Vermont%20v%20MP]HJ%20Technologies%20Complaint.pdf.

142. *Id.*

143. *Id.*

144. *Id.*

Other firms adopt an overly aggressive assertion model with weak copyright claims and are labeled copyright trolls.[145] These entities accumulate large copyright portfolios and aggressively seek out infringers.[146] Sometimes they price their settlement offers opportunistically low to induce a quick settlement.[147] Many of the targets include small- and medium-sized businesses and non-profits.[148] These copyright trolls engage in strategic legal bullying since their claims are baseless.[149] Their weak or baseless claims are then aggressively enforced with a legal threat.[150]

Another legal bullying practice in the intellectual property area occurs when a large company willfully breaches a smaller entity's intellectual property and engages in what

145. *See* Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 53–55 (2014) (discussing the emergence of new firms that threaten copyright litigation and the pursuit of statutory damages to extract quick lowball settlements from small unsophisticated parties and non-profits regardless of whether the use was legally protected); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 759 (2013) (suggesting reforms may be appropriate to address copyright trolls).

146. Greenberg, *supra* note 145, at 53. Getty Images exhibited copyright troll-like behavior when it sent a cease-and-desist letter to an attorney. The attorney litigated against Getty on the basis that he had never used Getty's images. *See* Joel Rothman, *Why We Sued Getty Images*, SCHNEIDER ROTHMAN (Aug. 20, 2014), http://www.sriplaw.com/sued-getty-images/.

147. Greenberg, *supra* note 145.

148. *Id.*

149. *Id.* at 59 (providing several examples of parties who assert weak copyright claims and defining a copyright troll as "a copyright owner who: (1) acquires a copyright—either through purchase or act of authorship—for the primary purpose of pursuing past, present, or future infringement actions; (2) compensates authors or creates works with an eye to the litigation value of a work, not the commercial value; (3) lacks a good faith licensing program; and (4) uses the prospect of statutory damages and litigation expenses to extract quick settlements of often weak claims").

150. For example, New York University law professor and copyright scholar Chris Sprigman agreed to represent an artist who was targeted by Katy Perry and accused of copyright infringement related to her Left Shark costume, which was popularized during a Super Bowl performance. Professor Sprigman's response to Katy Perry's attorneys' cease-and-desist letter is a well-researched and reasoned analysis for why the copyright claim to the Left Shark costume is unfounded. *See, e.g.*, Mike Masnick, *Left Shark Bites Back: 3D Printer Sculptor Hires Lawyer to Respond to Katy Perry's Bogus Takedown*, TECHDIRT (Feb. 9, 2015), https://www.techdirt.com/articles/20150209/11373729960/left-shark-bites-back-3d-printer-sculptor-hires-lawyer-to-respond-to-katy-perrys-bogus-takedown.shtml.

amounts to efficient intellectual property infringement.[151] When this occurs, a large company infringes knowing that the smaller party lacks the resources to challenge the action in court. For example, a U.S.-based entrepreneur in the handheld tool business claims this occurred when Sears broke off its business relationship and outsourced manufacturing of a similar "knock-off" product to China.[152] According to the small tool manufacturer, its patented, made-in-the-U.S.A. product was willfully infringed when Sears commercialized the low-cost and competing product.[153]

A large company can bully a smaller company by acquiring a portfolio of rights that it asserts against a small entity to receive an equity stake, cross-license, or strategic alliance. Something similar occurred when Facebook neared its initial public offering and Yahoo! asserted patent rights against it.[154] The threat of litigation was made to induce a settlement shortly before Facebook's initial public offering, amounting to something akin to extortion.[155] Facebook countered this bullying tactic by purchasing a portfolio of patent rights from its strategic partner Microsoft in order to countersue Yahoo![156] However, a smaller company without Facebook's considerable resources would likely have been forced to settle.

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151. David Kappos et al., *From Efficient Licensing to Efficient Infringement*, N.Y. L.J. (Apr. 4, 2016), http://www.newyorklawjournal.com/id=1202753754690/From-Efficient-Licensing-to-Efficient-Infringement?slret urn=20160313093242; Wrzesinski, *supra* note 21; *see also* Christopher Coble, *Did Target Steal this IP?*, FINDLAW (May 26, 2015), http://blogs.findlaw.com/free_enterprise/2015/05/did-target-steal-this-ip.html (discussing how retailer Target was accused of stealing an independent designer's t-shirt design).

152. *See* Cheryl Beise, *Sears Cannot Slip Wrench Maker's Trade Dress Claims*, INTELL. PROP. L. DAILY (Jan. 23, 2015), http://www.dailyreportingsuite.com/ip/news/sears_cannot_slip_wrench_maker_s_trade_dress_claims.

153. Complaint at 10–12, Loggerhead Tools, L.L.C. v. Sears Holdings Corp., No. 12-cv-9033 2013 WL 5951832 (N.D. Ill. Nov. 6, 2013).

154. Nicholas Carlson, *Just So We're Clear: Facebook Totally Demolished Yahoo in the Patent Fight that Just Ended*, BUS. INSIDER (Jul. 13, 2012), http://www.businessinsider.com/just-so-were-clear-facebook-totally-demolished-yahoo-in-the-patent-fight-that-just-ended-2012-7.

155. Other similar cases involve trade secrets and confidentiality agreements. *See, e.g.*, CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (describing a case where a large company sued former employees who had started a competing business alleging baseless trade secret claims and demanding a large royalty as a settlement).

156. *Id.*

C. *Commercial Speech*

To silence negative critiques made against them, companies sometimes assert tenuous disparagement claims against individuals or small businesses who make negative statements. These entities abuse the legal system by threatening legal action to silence any negative criticism. Faced with the prospect of expensive litigation, individuals capitulate and are effectively silenced. This litigious activity has been referred to as a strategic lawsuit against public participation, or a "SLAPP" suit.[157] In some cases, companies attempt to restrict consumers from posting truthful reviews online by adding non-disparagement clauses into contracts with customers.[158]

In one case, a blogger criticized a company called Magic Jack and its terms of service.[159] This negative online critique discussed how the end-user license agreement allowed Magic Jack to target ads based on its users' calls.[160] In response, Magic Jack filed a lawsuit against the blogger alleging that these statements were false and misleading and irreparably harmed Magic Jack's reputation.[161] The lawsuit demanded removal of the comments and unspecified damages.[162] The judge in the case declared the suit to be a SLAPP suit, granted the blogger's motion to dismiss the case, and awarded attorney's fees.[163]

In another case, the Dole Food Company filed a defamation suit against the filmmakers behind the documentary *Bananas!* because the film portrayed the company's activities in a

157. *See* Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENVTL. L. & POL'Y F. 17 (1993).

158. *See* Drew Fitzgerald, *Yelp, TripAdvisor Gain Legal Cover for Negative Reviews*, WALL ST. J. (Sept. 13, 2016) (discussing how small businesses attempted to silence truthful negative reviews through gag clauses in contracts), http://www.wsj.com/articles/yelp-tripadvisor-gain-legal-cover-for-negative-reviews-1473800424.

159. Complaint, MagicJack L.P. v. Happy Mutants L.L.C., No. CIV 091108 (Marin County Sup. Ct. 2009).

160. *Id.*

161. *Id.*

162. *Id.*

163. MagicJack L.P. v. Happy Mutants L.L.C., No. CIV 091108 (Marin County Sup. Ct. Jan. 5, 2010).

negative light.[164] This lawsuit was likewise declared to be a SLAPP suit and subsequently dismissed.[165] These two examples are outliers, however, since the targets of these SLAPP suits prevailed. In the majority of cases, the targets capitulate due to the high costs of litigation. The consequences of SLAPP suits extend beyond the cases at hand since these suits deter future speech and civic engagement.[166]

The attempt to suppress speech can cross into the intellectual property domain when parties abuse the Digital Millennium Copyright Act (DMCA) takedown notice process. In these cases, parties claim copyright or trademark ownership and make bulk claims of unlicensed use of their content, often in error.[167] Online service providers often take down material that property owners claim violates their rights even though a substantial portion of these takedown requests do not comply with basic legal requirements.[168]

D. *Business Regulation*

Sophisticated parties can also abuse the regulatory system to derive competitive advantage. In these cases, the legal bully exploits the high costs that arise from the complex institutional characteristics and procedures of our modern administrative state.[169] This type of bullying frequently occurs in industries that are traditionally regulated but also extends to those that are not.[170] For example, large alcohol manufactur-

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164. David S. Olson, *Dole Ordered to Pay Attorneys' Fees for Filing Defamation Lawsuit without Merit*, FOAM CAGE (Dec. 3, 2010), http://foamcage.com/dole-ordered-to-pay-attorneys-fees-for-filing-defamation-lawsuit-lacking-in-merit.

165. *Id.*

166. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 219 (1996).

167. Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J.L. SCI. & TECH. 387, 398 (2009).

168. *Id.* at 398–99.

169. *See* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987) ("[A] major puzzle . . . is why administrative law is as complex as it is . . . .").

170. *See* Myers, *supra* note 18, at 592–96 (discussing multiple cases where large incumbent firms abused the regulatory process to deter entry from start-up companies and competitors). These industries included traditionally regulated ones such as transportation, utilities and telecommunications but

ers, distributors, and retailers in Florida filed a regulatory challenge to injure the state's thriving microbrewery industry.[171] These large incumbent competitors filed an administrative challenge against the Florida Department of Business and Professional Regulation (DBPR).[172] The challenge sought to eliminate the DBPR's authority to license microbreweries' tasting rooms on the grounds that the DBPR lacked statutory authority to grant those permits. The claim was weak since there was statutory language indicating otherwise and the DBPR had been granting those licenses for several years.[173] The challenge was withdrawn after the microbrewery industry launched a legal-crowdfunding campaign that garnered significant financial backing and public support through social media and the mainstream press.[174]

As discussed earlier, Chik-fil-A strategically targeted the U.S. Patent and Trademark Office (PTO) to prevent Bo Muller-Moore, a Vermont entrepreneur and t-shirt maker, from registering the Eat More Kale mark.[175] Chik-fil-A filed a protest against this registration at the PTO and was successful in delaying the application and increasing Muller-Moore's registration costs. On December 18, 2011, Muller-Moore received an office action from the PTO indicating that they had

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also included industries that are not traditionally regulated, such as real estate. *Id.*

171. Andrew Thurlow, *Challenge to Craft Beer Taprooms is Withdrawn*, JACKSONVILLE BUS. J. (Jan. 28, 2015), http://www.bizjournals.com/jacksonville/news/2015/01/28/challenge-to-craft-beer-taprooms-is-withdrawn.html.

172. *Id.*

173. *Id.* The Florida statute under which the DBPR derived authority to grant microbreweries' the license to operate tasting rooms states:

> (2)(a) Notwithstanding s. 561.22, s. 561.42, or any other provision of the Beverage Law, the division is authorized to issue vendor's licenses to a manufacturer of malt beverages, even if such manufacturer is also licensed as a distributor, for the sale of alcoholic beverages on property consisting of a single complex, which property shall include a brewery. However, such property may be divided by no more than one public street or highway.

FLA. STAT. §561.221 (2012).

174. *See* David Orozco, *The Use of Legal Crowdsourcing ("Lawsourcing") to Achieve Legal, Regulatory and Policy Objectives*, 53 AM. BUS. L.J. 169 (2016).

175. *Id.* at 174.

not found any similar or pending marks.[176] Shortly after, on December 22, the PTO sent Muller-Moore notice that a letter of protest had been submitted claiming that Chik-fil-A's marks would be infringed and requesting that the Eat More Kale application be denied.[177] On March 27, 2012, the PTO reversed their earlier position and denied Muller-Moore's application on the basis of likelihood of confusion with the Eat Mor Chikin mark.[178] It was only after Muller-Moore secured pro bono legal representation with the University of New Hampshire Law School Intellectual Property Clinic and several lengthy office action rebuttals that he finally received a notice of allowance to register his trademark on December 9, 2014. This was nearly three years after he had received the initial favorable response from the PTO prior to Chik-fil-A's opposition.

E. *Anticompetitive Behavior*

Market incumbents sometimes resort to sham litigation as a rent-seeking behavior when they feel threatened by a new entrant that is taking away market share or disrupting their industry.[179] This rent-seeking behavior exploits litigation to shut out competitors in public and private ordering contexts and raises antitrust scrutiny. In reference to the abuse of public ordering means, former Judge Robert H. Bork once stated that "[p]redation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."[180]

In *California Motor Transport Co. v. Trucking Unlimited*, the U.S. Supreme Court held that the abuse of administrative and

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176. Office action from Caryn Glasser, U.S. Trademark Examiner to Daniel P. Richardson, attorney at Tarrant, Gillies, Merriman & Richardson (Dec. 18, 2011) (on file with author).

177. Letter of Protest Memorandum from Charles G. Joyner, Office of the Deputy Comm'r for Trademark Examination Policy to Andrew D. Lawrence (Dec. 22, 2011) (on file with author).

178. Office action from Caryn Glasser, U.S. Trademark Examiner to Daniel P. Richardson, attorney at Tarrant, Gillies, Merriman & Richardson (Mar. 27, 2012) (on file with author).

179. Orozco, *supra* note 25, at 34 (discussing the Florida microbreweries and Tesla cases as examples where incumbents use regulation to suppress new competitors who are disrupting the market).

180. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347 (1978).

judicial processes through sham litigation could trigger antitrust liability under the Sherman Act.[181] This liability is an exception to the immunity generally provided by the Noerr–Penington doctrine.[182] The Noerr–Pennington doctrine stands for the proposition that lobbying or petitioning the government to achieve anticompetitive goals does not generally impose antitrust liability since the Sherman Act was meant to regulate business activity, not political activity.[183] As a result, only when sham litigation seeks to achieve plainly anticompetitive results would it lose its First Amendment protection and potentially result in antitrust liability.[184] The courts recognize that sham litigation intended to harass a competitor can have an immediate and severe impact on competitors.[185]

In other instances, legal bullies use private contracting as a means to stifle competition in a way that triggers antitrust scrutiny. For example, in 1983 Ben and Jerry's ice cream was a relatively new but growing company trying to expand into the Boston area.[186] Their much larger competitor, Haagen Dazs, owned by Pillsbury, attempted to thwart that process by forcing its distributors and grocery store customers to sign exclusive distribution agreements in the premium ice cream market category.[187] In the end, Ben and Jerry's prevailed due to a clever public relations campaign—"What's the doughboy afraid of?"—that publicly shamed Pillsbury into withdrawing their ex-

181. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

182. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961). Also, the Court held that the First Amendment protects the right to petition the government. *Id.* at 137–38; Balmer, *supra* note 18, at 56–60.

183. *Noerr Motor Freight, Inc.,* 365 U.S. at 136.

184. *See* Balmer, *supra* note 18, at 56; California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 at 512–16 (1972) (holding that filing baseless suits that have an anticompetitive effect are not protected under the Noerr–Pennington doctrine and may trigger antitrust liability).

185. Balmer, *supra* note 18, at 63 ("[I]ndeed, by striking directly as a competitor through the judicial process, it is likely that one firm can cause more harm to another than it could through predatory pricing, exclusive dealing, or other frequently discussed anticompetitive activities. This is particularly true when lawsuits are brought against small companies.").

186. Ben Cohen, *When the Market Rules, the Big Guy Wins*, CNN (Dec. 18, 2011), http://www.cnn.com/2011/12/16/opinion/cohen-benjerry-business-regulations/.

187. *Id.*

clusivity demands.[188] Ben and Jerry's also filed a lawsuit on antitrust grounds. However, they later acknowledged that they would have been financially hampered had the public relations campaign not induced a favorable and quick out-of-court settlement.[189]

Another legal bullying practice that triggers antitrust liability is the use of contracts to control the supply of key inputs. An example of this practice occurred in the case of *Eastman Kodak Co. v. Image Technical Services*.[190] In that case, Kodak implemented a policy of selling copier parts exclusively to customers that obtained after-market maintenance and repair services from Kodak. Independent service operators were ineligible to buy these parts and many of them were forced out of business even though later the courts held Kodak's practice to be in violation of the antitrust laws.[191]

Filing a meritless lawsuit with the goal of shutting out a competitor has clear anticompetitive aims. Sometimes it is combined with other abusive tactics. For example, in some cases, large companies file meritless suits against smaller entrants to the market.[192] This burdens the smaller entrant with the high costs of litigation and the large company may take further steps to engage in a public relations campaign to discredit the new entrant by informing their investors, suppliers, and customers about the pending litigation.[193] This unfair activity takes a negative toll on the smaller company's business.[194]

III.
Defensive Techniques

The rent-seeking legal bullying strategies discussed in the prior section yield significant gains for companies. However, they distort the competitive landscape, create social welfare

188. *See* Orozco, *supra* note 25; J.P. Kahn, *The Inc. 100 Portfolio*, Inc. Mag. (May 1, 1986), http://www.inc.com/magazine/19860501/194.html.

189. Cohen, *supra* note 186.

190. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 458 (1992).

191. *Id.*

192. Smith, *supra* note 13, at 1099.

193. *Id.* at 1100–01.

194. *Id.* at 1101–02 (discussing cases where products were boycotted and investors pulled financing as a result of meritless litigation).

losses, and injure the public perception of the law as a means to achieve justice and fairness in the marketplace. When successful, these practices yield competitive advantage due to lower labor costs, expanded market power, and preferential access to resources achieved by thwarting competition and silencing negative commentary. Much more can be done to prevent these abusive practices, however. The legal system has developed several protective defensive measures. Victimized parties have also started to employ innovative extra-legal defensive techniques. Both types of public and private ordering defensive measures are examined in this section.

A. *Public Ordering Defensive Measures*

1. *Judicial Doctrines and Equitable Powers*

As the gatekeepers of legal claims during the early pleadings stage of litigation, judges can significantly reduce litigation costs and limit the harmful effects of legal bullying. For example, in some cases the courts tailor doctrines that immediately blunt the force of legal bullying. One recent example involved social media and personal jurisdiction. In *Burdick v. Superior Court*, the California appellate court granted defendant's motion to dismiss a defamation case due to lack of personal jurisdiction.[195] That court stated:

> We hold that posting defamatory statements about a person on a Facebook page, while knowing that person resides in the forum state, is insufficient in itself to create the minimum contacts necessary to support specific personal jurisdiction in a lawsuit arising out of that posting. Instead, it is necessary that the nonresident defendant not only intentionally post the statements on the Facebook page, but that the defendant expressly aim or specifically direct his or her intentional conduct at the forum, rather than at a plaintiff who lives there.[196]

The California court's standard for personal jurisdiction in online defamation cases can limit SLAPP suits filed by legal bullies domiciled there. The doctrine set forth in *Burdick* raises litigation costs for legal bullies who reside in California and

195. Burdick v. Superior Court, 233 Cal. App. 4th 8 (2015).
196. *Id.* at 13.

lowers the costs for the bullying target who resides outside the state.

Another important tool used by courts to limit legal bullying during the pleading stage is the authority to grant a motion to dismiss.[197] The motion to dismiss is based on the failure to state a claim for which relief can be granted.[198] In these cases, the legal bullying target can make a strong case that the bully's complaint is near the legal entitlement frontier and asserts a position that is contrary to established precedent, fails to address controlling law, or cannot cite case law to support its theory.[199] The motion could spell the end of a legal bullying campaign in the early stages of litigation.[200]

Specifically, judges should be looking for certain clear indicators of strategic legal bullying that will help them decide whether to grant a motion to dismiss. In addition to a baseless claim, these indicators include: (1) the legal bully is a dominant firm or part of a conspiracy; (2) the legal bullying target is a recent or potential entrant or competitor; and (3) the effect of the legal bully's action is to deter or delay entry or expansion by the target or to cause its exit from the market.[201]

Courts can also deter legal bullying by imposing sanctions and awarding attorney's fees under the rules of civil procedure and professional conduct. One standard for imposing sanctions and awarding attorney's fees is governed by Rule 11 of the Federal Rules of Civil Procedure[202] and state law equivalents.[203] Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded

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197. FED. R. CIV. P. 12(b)(6). Under Rule 12(b)(6), a motion to dismiss can be awarded for failure to state a claim, claiming that even if all the plaintiff's allegations are true, they would not be legally sufficient to state a claim on which relief might be granted.

198. *Id.*

199. *See* Monte L. Mann & John Haarlow, Jr., *Recovering Attorney Fees for Defending Frivolous Claims*, 100 ILL. B.J. 474, 475 (2012).

200. *See, e.g.*, Brooks Bros. Grp., Inc. v. Bubbles by Brooks, LLC, No. 91205596 (T.T.A.B 2013) (case in which Brooks Brothers' trademark opposition against a small business owner was withdrawn after a motion to dismiss was filed that argued the marks were vastly dissimilar).

201. KLEIN, *supra* note 3, at 25.

202. FED. R. CIV. P. 11.

203. *See, e.g.*, WIS. STAT. § 802.05 (2015) (the Wisconsin equivalent of Federal Rule 11).

in fact, legally tenable, and not meant to harass, cause delay, or raise litigation costs.[204] The courts employ a standard of "objective reasonableness," and if a violation is found, sanctions are awarded in the court's discretion.[205]

Furthermore, Rule 11 specifically provides that "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."[206] Whenever there is evidence of legal bullying, judges should signal their intent to apply Rule 11. If a violation has occurred, judges can grant motions for punitive damages,[207] sanctions,[208] and/or attorney's fees. These remedies should be awarded in cases that involve legal bullying to deter future instances of this harmful behavior.[209] Yet another option is for targets to file a claim of vexatious litigation, which may result in trebled damages.[210] These claims, however, are tort-like in nature and require a jury assessment. They are, therefore, lengthy and expensive proceedings that many legal bullying targets are unable to finance.[211]

2. *Legislative Solutions*

Legislative efforts to curtail legal bullying practices involve a patchwork of statutes that cut across numerous state and federal legal subject areas. For example, a growing number of state statutes protect employees from wage theft.[212] Various recently-enacted state statutes protect individuals from patent

204. FED. R. CIV. P. 11.

205. *See* Merriam & Benson, *supra* note 157, at 30.

206. FED. R. CIV. P. 11(c)(3).

207. Punitive damages are often awarded in cases involving bad faith, fraud or willful conduct. *See* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 644–51 (1999) (discussing the role of punitive damages in state contract law).

208. *See* 28 U.S.C. § 1927 (sanctions awarded for unreasonable and vexatious conduct); Lanham Act § 35, 15 U.S.C. § 1117 (2006) (allowing for the awarding of attorney's fees in exceptional cases).

209. These sanctions can only be awarded within the context of litigation and in many instances of legal bullying litigation is never pursued since the target lacks the finances to access the courts. *See* Manta, *supra* note 81, at 860.

210. *See, e.g.,* CONN.]GEN. ST. § 52-568 (1992); GA. CODE ANN. § 51-7-81 (1992); MICH. COMP. LAWS § 600.2907 (1986).

211. Mann & Haarlow, *supra* note 199.

212. *See, e.g.,* S.B. 914, 2015 Leg. Sess. (Conn. 2015) (allowing victims of wage theft to collect double the amount due them and shifting the burden of proof from the employee to the employer).

bullying behavior.[213] Some state laws have been enacted to prevent SLAPP suits.[214] Federal and state consumer protection laws also prohibit anticompetitive behaviors and have been used to combat legal bullying behavior.[215] This patchwork of statutes offer some relief, however. They are not uniformly distributed across all the states and they are subject to legislative processes that might be tempered by lobbying from large corporations, the parties most likely to engage in strategic legal bullying.[216]

The general rule governing attorney's fees in the United States is that each party pays their own legal fees regardless of who wins or loses.[217] Legal bullies greatly exploit this fundamental feature of the U.S. litigation system.[218] Some statutes, however, contain fee-shifting provisions that allow judges to award attorney's fees to the winning party. Fee-shifting provisions can be found in some statutes that involve strategic legal bullying. For example, section 285 of the Patent Act and section 1117(a) of the Lanham Act authorize a district court to award attorney's fees in patent and trademark litigation. Both statutes state that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."[219] Courts also

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213. *See, e.g.*, VT. STAT. ANN. tit. 9, § 4196-99 (West 2013) (regulating bad faith assertions of patent infringement); FLA. STAT. ANN. § 501.991-997 (West 2015) ("Patent Troll Prevention Act").

214. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2006); IND. CODE § 34-7-7-1 (1998).

215. *See* Roger Allan Ford, The Uneasy Case for Patent Federalism 9 (2015) (working paper) (on file with author) ("State attorneys general have occasionally targeted patent owners under state 'mini FTC' laws, but otherwise, states have mostly stayed out of patent disputes."); *see also* Vermont v. MPHJ Tech. Invs., LLC, No. 2:14-cv-192, 2015 U.S. Dist. LEXIS 3309 (D. Vt. Jan. 9, 2015) ("[T]he State filed its original Complaint in this case under the VCPA, Vt. Stat. Ann. tit. 9 §§ 2451 et seq.").

216. *See* Dave Jamieson, *U.S. Chamber Lobbies to Kill Measure That Would Punish Wage Theft*, HUFFINGTON POST (Jul. 10, 2014), http://www.huffingtonpost.com/2014/07/10/us-chamber-lobbies-wage-theft_n_5575095.html (discussing how the U.S. Chamber of Commerce attempted to thwart a federal bill that would punish federal contractors who had committed wage theft).

217. Rosen-Zvi, *supra* note 20, at 731 ("[U]nder the American Rule, the prevailing party is ordinarily not entitled to collect attorney's fee from the loser.").

218. Most foreign jurisdictions follow the opposite rule whereby the losing party pays the winning side's fees.

219. 35 U.S.C. § 285; 15 U.S.C. § 1117(a). The U.S. Supreme Court recently held that an exceptional case "is simply one that stands out from

maintain an inherent power to order fee-shifting when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[220]

Statutory fee-shifting provisions, however, have several important drawbacks. First, they exist within the patchwork of individual statutes that disparately deal with legal bullying and, therefore, will not apply to all instances of legal bullying.[221] Fee-shifting provisions that deal with purely state law issues, therefore, may not exist in all fifty states. Second, fee-shifting provisions are within the judge's discretion and are not automatically granted.[222] Since fees are awarded after litigation they also suffer the fundamental drawback of not entirely removing the financial burdens of litigation, which is the strategic advantage legal bullies exploit to extract favorable out-of-court settlements. Lastly, fee-shifting statutes often do not provide reimbursement for expert witness expenses.[223]

B. *Private Ordering Defensive Measures*

1. *Techniques to Reduce Litigation Costs*

a. Class Action Lawsuits

Individuals and small businesses are prime legal bullying targets because they often lack legal knowledge and the means to finance litigation. Class action litigation offers an opportunity for parties who have been aggrieved under similar circum-

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others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." Octane Fitness, LLC. v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1751 (2014).

220. *Octane Fitness, LLC.*, 134 S. Ct. at 1749 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258–59 (1975)).

221. *Supra* notes 113–94 and accompanying text.

222. Rosen-Zvi, *supra* note 20, at 731; *see also* Malibu Media, LLC v. Leo Pelizzo, No. 14-11795 (11th Cir. Mar. 26, 2015) (motion for attorney's fees was denied despite defendant winning a case against copyright troll Malibu Media).

223. *See* Order Granting in Part and Denying in Part Defendant's Motion for Attorney's Fees, Advanced Ground Information System, Inc. v. Life360, Inc., No. 14-CV-8065, 2015 WL 4522718, at *2–3 (S.D. Fla. Mar. 3, 2015). In this "exceptionally weak case" that involved patent claims, the judge awarded attorney's fees to the defendant but denied their request for expert witness fees. *Id.*

stances by the same party to collectively file a suit.[224] This spreads litigation costs among various plaintiffs who might be harmed by legal bullying. For example, employees victimized by wage theft or oppressive contract terms have successfully joined together in class action suits.[225] Likewise, class actions can be an effective technique in cases that involve weak intellectual property claims. For example, a class action lawsuit effectively challenged the copyright troll that claimed ownership of, and litigated, the lyrics to the Happy Birthday song.[226]

Recently, however, the courts have limited plaintiffs' ability to join class action suits. In *Wal-Mart v. Dukes*, the U.S. Supreme Court developed a standard that makes it more difficult for plaintiffs to be certified as a class per the commonality requirement.[227] The courts have also upheld arbitration clauses in contracts that prevent contracting parties from joining a class action suit or arbitration.[228] When applicable, these judicial doctrines raise the cost of litigation by preventing an indi-

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224. *See* Ford v. Murphy Oil U.S.A., Inc., 703 So.2d 542, 544 (La. 1997) (discussing how class action certification is a non-traditional litigation procedure that allows a representative with typical claims to stand in judgment for a class of similarly situated persons). Recently, however, the U.S. Supreme Court has tightened restrictions for certifying a group of plaintiffs as a class. *See* Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 EMORY L.J. 477, 483 (2014) ("Rule 23 does not set forth a mere pleading standard. . . . A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.") (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

225. *See* Brown v. Abercrombie & Fitch Co., No. CV141242JGBVBKX, 2015 WL 9690357 (C.D. Cal. July 16, 2015).

226. *See* Trial Motion, Memorandum & Affidavit at 1–2, Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc., No. 2:13-cv-04460-GHK (MRWX), 2016 WL 616583 (C.D. Cal. Feb. 8, 2016).

227. *Dukes*, 131 S. Ct. at 2551 (requiring plaintiffs to demonstrate significant proof that a unifying element exists to demonstrate that a general, corporate-wide policy of discrimination caused the injury to the class members). Class certification is based on four threshold requirements, i.e., whether there is a sufficiently large number of individuals to justify a class, commonality exists among all members, the plaintiff represents a typical member of the class, and the representative adequately protects the interests of the class without substantively jeopardizing their own interests. FED. R. CIV. P. 23(a).

228. *See* AT&T Mobility, LLC. v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempts state laws that forbid class arbitration waivers).

vidual from joining a class and spreading the high cost of litigation among various parties.[229] Indirectly, these doctrines enable strategic legal bullies in cases where class action suits would deter their abusive behavior.

b. Contingency Fee Arrangements

If a party is the sole target of legal bullying, a class action lawsuit will not be available and the inordinate costs of litigation will fall solely upon that individual.[230] In these cases, the attorney–client contingency fee arrangement plays an important role in providing necessary up-front financing to the plaintiff, to be recouped by the attorney once a settlement is reached or judgment entered. For example, a small company whose patent is being willfully infringed by a large company may use this technique to finance a patent lawsuit.[231] A boutique legal industry has taken hold that litigates patent suits that allege infringement by a large "deep pocket" company.[232] This option is unfortunately not available in many cases since contingency fee attorneys selectively choose to litigate cases with favorable prospects of substantial financial recovery. In some legal bullying cases, the prospect of significant financial recovery is not available and will prevent parties from securing contingency fee-based representation.[233] This is likely to occur in cases that involve trademarks, patents, copyrights, or business regulation.

Victims of trademark bullying can rarely obtain monetary damages since they often must defend a baseless suit that has been brought against them. Even if the issue involves efficient trademark infringement and the victim is the plaintiff, usually all the plaintiff can hope to obtain is the equitable remedy of

229. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 634 (2012) (discussing cases that challenged the use of these waivers as a mechanism that raises costs for plaintiffs).

230. *See id.*

231. *See* AIPLA, *supra* note 88.

232. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 351–54 (2012).

233. Rosen-Zvi, *supra* note 20, at 729 ("[T]he risk contingency fee lawyers bear in taking on cases on this basis creates a strong incentive for them to screen cases and turn down the riskier ones that are unlikely to generate any profit.") Also, contingency fee-based representation will not occur in cases that do not involve monetary damages. *Id.* at 730.

an injunction.[234] The same can be said of copyright and patent trolling, where the bullying victim must respond defensively and absorb the high costs of litigation without prospect for monetary damages. Monetary damages are also seldom awarded in business regulation disputes since the nature of these disputes often involves challenges to property rights rather than their enforcement.

c. Pro Bono Representation

In some cases, individuals or small businesses may seek pro bono legal assistance. This occurred in the Eat More Kale case. In that case, the University of New Hampshire Law School Intellectual Property Clinic agreed to represent Muller-Moore in his case against Chik-fil-A on a pro bono basis. Small and medium-sized business may take advantage of similar pro bono intellectual program clinics that participate in the U.S. Patent and Trademark Office's Law School Clinic Certification Program.[235] Alternatively, they may seek pro bono representation from law firms or local small business development councils and aid groups such as the Volunteer Lawyers for the Arts. However, the need and demand for pro bono legal representation among small business owners and entrepreneurs are very high.[236] Only a few entrepreneurship law clinics will represent parties who have been targeted by legal bullying.[237]

2. *Professional Misconduct Sanctions*

State rules based on the American Bar Association's *Model Rules of Professional Conduct* may apply in egregious cases that involve legal bullying.[238] For example, Model Rule 3.1 addresses the issue of good faith in advocacy. Rule 3.1 states: "A

234. *See* Ryan McLeod, Note, *Injunction Junction: Remembering the Proper Function and Form of Equitable Relief In Trademark Law*, 13 DUKE L. & TECH. REV. 1 (2006).

235. *Law School Clinic Certification Program*, USPTO (2016), http://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1.

236. *See Entrepreneurship Legal Clinic*, UNIV. PA. L. SCH., https://www.law.upenn.edu/clinic/entrepreneurship/clinic-client.php (last visited Jan. 19, 2016).

237. For example, the University of New Hampshire Intellectual Property Clinic represented Mr. Muller-Moore in his case against Chik-fil-A.

238. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

lawyer shall not bring or defend a proceeding, or assert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal."[239] This rule encourages zealous legal advocacy and allows for strained interpretations of the law. However, in egregious cases of legal bullying where an argument is made near or at the legal entitlement frontier, professional misconduct sanctions should be pursued.[240]

Judges, however, rarely award sanctions even when they are requested, in part to promote the standard of zealous advocacy that is expected under the rules of professional conduct.[241] The standards for awarding sanctions also rely on subjective good faith requirements that are difficult to prove.[242] In one egregious case, the court denied sanctions even when attorneys cited authority in a brief without mentioning that their citations and arguments would result in the extension of existing law.[243] Also, the standards for awarding sanctions are far from uniform and vary considerably from judge to judge and state to state.[244] As a result, attorney conduct must reach fairly egregious levels for judges to award sanctions to the opposing party.[245]

3. *Social Media, Public Relations, and Legal Crowdsourcing*

Entrepreneurs and small businesses have started to employ creative extra-legal methods to combat strategic legal bullying. An emergent practice uses social media to influence public opinion and exert public relations pressure on legal bullies.[246] This occurred in the Simply Mayo, Eat More Kale, and Florida microbrewery cases mentioned earlier. In these

239. *Id.* at R. 3.1.

240. *See* Ostas, *supra* note 2, at 713 ("Zealousness on one side balances zealousness on the other, and the synthesis, provided by the impartial judge, renders a reasonably fair, and potentially best, result. If the system is working effectively, the advocate should assert the interpretation, even if strained, that advances the interests of the client.").

241. David P. Atkins, *SLAPP Suit Remedies: Attorney Sanctions*, 12 U. BRIDGEPORT L. REV. 993, 998 (1992).

242. *Id.*

243. *Id.*

244. *Id.* at 994.

245. *Id.* at 998.

246. Orozco, *supra* note 174.

cases, aggrieved individuals and advocacy groups leverage social media to build awareness and initiate advocacy campaigns based on discrete legal issues.[247] These public relations, social media, and legal crowdsourcing campaigns highlight the legal bullying tactics and often depict a David-versus-Goliath scenario that builds awareness and support through vigorous public debate. The negative attention often causes the legal bully to capitulate and drop their legal claim.[248]

IV.
Business Norms, Ethics, and Corporate Social Responsibility

The best approach to combat strategic legal bullying is to allow parties to devise private ordering solutions that limit this practice as much as possible. Business norms, ethics, and corporate social responsibility play an instrumental role to achieve an efficient and positive level of self-enforcement and regulation.[249] Business norms provide an important backdrop to any legal decision. As stated by LoPucki and Weyrauch in their important work on legal strategy: "The view that written law drives legal outcomes is plausible only because written law (to the extent it has any meaning at all) is usually in accord with social norms."[250]

As Robert Ellickson's *Order Without Law* demonstrates, parties who bargain in the shadow of the law sidestep the formal legal system when they prioritize social norms above formal legalistic solutions, even when transaction costs are low and not an impediment to bargaining.[251] In those circumstances, being a good neighbor means resolving conflicts with-

247. *Id.*

248. Orozco, *supra* note 25.

249. *See* David Hess et al., *The Next Wave of Corporate Community Involvement: Corporate Social Initiatives*, 44 Cal. Mgmt. Rev. 110, 114 (2002) ("A firm's performance depends on its capacity to anticipate and adjust not only to competition and rapid technological transformation, but also to changes in the attitudes of consumers, employees, governments, investors and other stakeholders.").

250. LoPucki & Weyrauch, *supra* note 2, at 1435.

251. When the cost of resorting to public ordering institutions such as the courts is high, private parties often negotiate their own private ordering solution. *See* Ellickson, *supra* note 4, at 52.

out resorting to legal threats.[252] In the context of corporate conduct, however, legal bullying epitomizes bad neighborly behavior since it disregards business norms in favor of hyper-litigious behavior.

Business norms play a fundamental role in any well-functioning marketplace. According to research, fundamental business norms include maintaining a strong reputation, good faith, honoring agreements, and standing behind a high-quality offering.[253] The fact that a great quantity of businesses refuse to engage in strategic legal bullying even though it would be economically rational attests to the power of business norms and ethics in day-to-day marketplace behavior.[254] The important role that business norms play in business was examined by the pioneering work of sociological and relational contract scholars. These scholars were among the first to study the priority that business people ascribe to norms rather than legalistic formalities and processes.[255]

Legal bullies violate important relational contracting norms when they exploit the high costs of the legal system and stand behind baseless legal claims. Often times, a private ordering solution to a dispute can be achieved through contracts and relationship building that seeks to avoid litigation. Legal bullies, however, do not proceed in this manner. Instead, they resort to the threat of litigation to support their rent-seeking strategy to chill what would be otherwise productive and lawful

252. *Id.*

253. Macauley, *supra* note 8.

254. *See* Daniel T. Ostas, *Cooperate, Comply or Evade? A Corporate Executive's Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559 (2004) (distinguishing between businesses that comply vs. cooperate with existing laws and regulations). According to Ostas, ethical behavior sometimes calls for cooperation with the law to resist the temptation to exploit legal loopholes, interpret legal ambiguities with reference to the public good, and uphold the spirit of the law even when it is not effectively enforced.

255. *See* IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 12–13 (2d ed. 1978). The hallmarks of a relational contract include longer duration and greater personal interaction and cooperation between the contracting parties. *Id.*; *see also* Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 NW. U. L. REV. 1018, 1025 (1981) (discussing how discrete contractual transactions differ from relational contracts in such characteristics as: commencement, duration, termination, measurement and specificity, planning, sharing vs. dividing benefits and burdens, interdependence, future cooperation, solidarity, personal relations among participants and power).

behavior. This aggressive and abusive tactic, often accomplished through impersonal letters sent by hired-gun attorneys, violates the important business norms of trust, fairness, reciprocity, and honorable conduct that can be gained through a good faith effort to develop relational business contracts.[256]

The bad litigious neighbors described in *Order Without Law* failed to maintain a good neighborly reputation that is gained by acting in an amicable, helpful, and respectful way towards others. Like bad neighbors, corporate legal bullies downplay the role of reputation, mainly because they assume that they will not suffer any negative reputational harm. Unlike the ranchers in tight-knit rural California, legal bullies exploit the fact that they are largely unknown to their target and its surrounding community. Legal bullies are often large corporations domiciled in a distant place or shell companies that communicate primarily through their hired-gun attorney's letterhead.[257]

The legal bully's presumption of anonymity is increasingly misplaced given the widespread use of social media to shame legal bullies.[258] Like some of the cattle ranchers in *Order Without Law*, legal bullying victims resort to self-help when they encounter unethical behavior.[259] Their analogue to gossip as a self-help remedy among cattle ranchers is their use of social and traditional media to generate public commentary and to tarnish the legal bully's reputation.[260] Increasingly, companies view their reputation and standing in the community as a vital business asset.[261] This negative public commentary focuses on the unfair, harassing nature of the legal bully's claim and exposes the bully to severe criticism, as demonstrated in the Just

256. MACNEIL, *supra* note 255, at 12–13.

257. *See* Vermont v. MPHJ Tech. Invs., LLC, 803 F.3d 635 (Fed. Cir. 2015).

258. Orozco, *supra* note 25.

259. ELLICKSON, *supra* note 4, at 56–57.

260. Orozco, *supra* note 25.

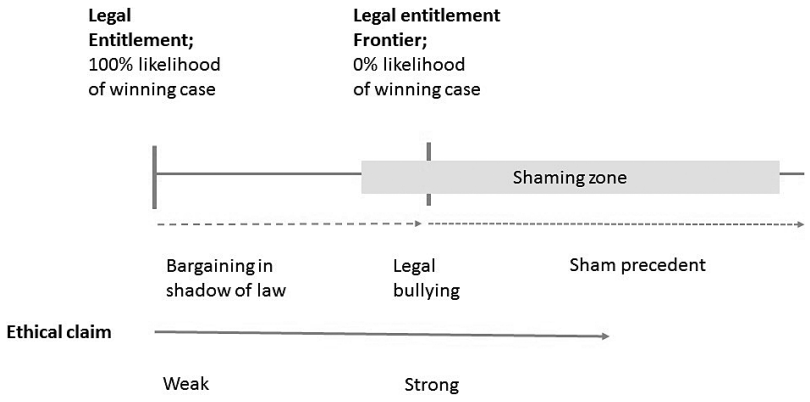
261. *See* Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 320–21 (2004) (discussing how businessmen surveyed in their study mentioned that the sanctions they feared the most were not legal, but instead the informal sanctions imposed by the media and the public and how they went to great lengths to avoid "anything that could give you a bad name").

Mayo, Eat More Kale, Florida microbreweries, and Ben and Jerry's examples discussed earlier.[262]

When a case of legal bullying is removed from the private litigation sphere to the arena of public discourse, the conversation shifts from one that primarily involves legal language to one that primarily involves ethics.[263] The bully's hyper-litigious behavior is recast in relation to their unreasonable demands and oppressive conduct though the lens of public ethical commentary. The risk of this occurrence increases as the bully's baseless claim approaches the legal entitlement frontier. At some point near this frontier the legal bully enters a public "shaming zone."

This process can be depicted theoretically and visually in Figure 2.

FIGURE 2.



As illustrated in Figure 2, the legal entitlement frontier is the point where the legal claim is no longer viable if it were to be decided on the legal merits in court. As the bully's claim nears the legal entitlement frontier the claim gets weaker. The legal bully strategically asserts a baseless claim near or beyond the frontier and exploits the high legal transaction and transfer costs to extract rents from their target. Once a claim enters the shaming zone, however, the public takes interest in the issue and public discourse rapidly adopts ethical overtones.

262. Orozco, *supra* note 25.
263. *Id.*

Corporate legal bullies fail to recognize that the ethical impact of their claims increase as they enter the shaming zone, the area near the entitlement frontier where they are at risk of being publicly vilified through legal crowdsourcing methods.[264] Once they are in the shaming zone, the legal bully is at great risk of breaching the implied social contract between businesses and society.[265] Also, at this point they risk a viable challenge to their social license to operate since the community is likely to support the target.[266] A reason why the targets of legal bullying have been able to successfully use legal crowdsourcing methods to obtain support far beyond their immediate communities and existing customer base may be because the bullying act violates a hyper-norm.[267] When a company violates a hyper-norm, the reaction extends beyond the immediate locality since the behavior is universally condemned.[268] In this case, the hyper-norm that is violated is the misuse of the legal system to achieve illegitimate business objectives.[269] As

264. Orozco, *supra* note 174.

265. *See* Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 262 (1994) (discussing how communities may define social microcontracts).

266. *See* Gunningham et al., *supra* note 261, at 308 (defining the social license to operate as "the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society. In some instances the conditions demanded by 'social licensors' may be tougher than those imposed by regulation, resulting in 'beyond compliance' corporate environmental measures even in circumstances where these are unlikely to be profitable.").

267. *See* Donaldson & Dunfee, *supra* note 265, at 265 (defining a hypernorm as "principles so fundamental to human existence that they serve as a guide in evaluating lower level moral norms"); Orozco, *supra* note 174 (discussing how legal crowdsourcing methods generate support beyond the existing customer base and might actually lead to new customers and supporters).

268. *See* Andrew Spicer et al., *Does National Context Matter in Ethical Decision Making? An Empirical Test of Integrative Social Contracts Theory*, 47 ACAD. MGMT. J. 610, 617–18 (2004) (finding that hyper-norms were universally respected across national boundaries).

269. *See* Donaldson & Dunfee, *supra* note 265, at 265 (proposing to "use the existence of the convergence of religious, cultural, and philosophical beliefs around certain core principles merely as a clue to the identification of hypernorms").

seen in prior cases, violating this hyper-norm results in swift and universal condemnation.

When a company enters the shaming zone, various parties such as customers, the media, activists, regulators, business partners, and investors respond with non-market strategies that pressure the legal bully to stop its rent-seeking behavior.[270] Non-market activists are becoming increasingly sophisticated and successful in coordinating their public shaming and advocacy campaigns.[271]

From a social welfare perspective, the best antidote to strategic legal bullying is for companies to realize that this practice is illegal, unethical, and against their own interests. To operationalize this private ordering self-policing solution, companies should integrate in-house and external legal counsel with their existing compliance and corporate social responsibility (CSR) programs.[272] CSR has become an important business ethics issue and it promotes behavior that goes beyond legal compliance. One of the dominant paradigms of CSR includes stakeholder theory, which asserts that firms have relationships with several important constituent groups and that these stakeholders both affect and are affected by the firm's behavior.[273]

From a compliance perspective, firms can integrate a policy against legal bullying with their existing code of ethics, compliance program, employee training modules, and statements made by top executives that reflect the "tone at the top."[274] All of these integrity-based compliance practices can help to establish a corporate culture that prevents legal bullying from taking root.[275] Compliance personnel and in-house

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270. *See* Baron, *supra* note 35, at 80; David P. Baron & Daniel Diermeier, *Strategic Activism and Nonmarket Strategy*, 16 J. ECON. MGMT. & STRAT. 599, 602–03 (2007) (discussing how activists employ targeted campaigns against companies they view are acting unethically and the target of the campaigns are the company's existing customers).

271. Baron & Diermeier, *supra* note 270; Orozco, *supra* note 174.

272. *See* Whelan & Ziv, *supra* note 64.

273. *See* Abagail McWilliams & Donald Siegel, *Corporate Social Responsibility: A Theory of the Firm Perspective*, 26 ACAD. MGMT. REV. 117, 118 (2001).

274. *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. (forthcoming 2017) (manuscript at 45–47) ("A 'tone at the top' established by senior management and the board of directors is critical to ensuring corporate integrity and deterring fraud.").

275. *Id.*

corporate legal departments should take a strong leadership position to ensure that the principal corporation does not condone or engage in any strategic legal bullying practices.

Firms that integrate a legal bullying prohibition within a CSR framework have a better chance of implementing self-policing behaviors that result in restraint, good judgment, and the ability to seek a fair resolution that upholds business norms such as relational contract.[276] As the principals in the attorney–client relationship, companies should guide attorneys towards the ethical values reflected in these policies instead of the knee-jerk aggressive legal tactics that hired-gun attorneys facilitate. The in-house attorneys should play a gatekeeping role to ensure that internal and external attorneys do not engage in the hired-gun practices that enable legal bullying. In this role, corporate attorneys work as advisors rather than advocates in a way that ensures compliance through shared governance with internal and external stakeholders.[277] The spirit of ethical advising is also reflected in the American Bar Association's Model Rule 2.1. That rule states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[278]

As a form of private regulation, CSR plays a significant role in shaping good corporate citizenship.[279] Companies that follow CSR models increasingly require their partners and suppliers to abide by CSR principles that respect labor, diversity, environmental, and human rights interests.[280] External law firms are increasingly viewed as suppliers and firms require

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276. *See* Ostas, *supra* note 254 (calling for legal cooperation rather than mere compliance).

277. *See* Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 341 (2007) (noting that one aspect of the lawyer's role in new governance involves "freeing lawyers from their traditional, cautious, litigation-wary stance so that they can become more creative problems solvers."); Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. (forthcoming 2016) (discussing the emerging roles of in-house attorneys as advisors and whistleblowers through a new governance model of self-regulation and self-policing).

278. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

279. *See* Whelan & Ziv, *supra* note 64.

280. *Id.*

them to follow CSR guidelines and best practices. It is now common for large in-house departments to issue guidelines to external counsel that requires them to adopt the firm's internal CSR policies.[281] These guidelines are closely monitored and enforced by in-house counsel. The threat to terminate a lucrative business relationship due to non-compliance is a significant deterrent.[282]

The CSR guidelines that in-house legal departments issue to external counsel often refer to ethics and the fair engagement of the legal system. Bank of America's attorney guidelines, for example, direct outside lawyers not to use "[c]oercive, dilatory or obstructive tactics" and discourage protracted motion practice.[283] Guidelines also encourage external counsel to pursue alternative dispute resolution practices to solve disputes in a speedy and fair manner.[284] Wal-Mart also amended its outside counsel guidelines to warn external counsel not to abuse the legal system during the discovery stages in litigation, a maneuver that imposes significant costs and delays, particularly on smaller parties.[285]

In-house counsel should, therefore, adopt specific language in their existing attorney guidelines that forbids strategic legal bullying practices. Periodic audits should be done to ensure compliance and any evidence of actions that violate the prohibition against legal bullying should be promptly addressed. This all assumes that strategic legal bullying is initiated by an overzealous hired-gun attorney, but that is not always the case. Often, the corporate client is the impetus for legal bullying behavior. In these instances, external counsel should rely on the company's CSR guidelines to thwart the bullying attempt and counsel the client that engaging in this behavior would be legally untenable, and against their own

281. *Id.*
282. *Id.*
283. *Id.*
284. For example, parties to a trademark dispute might avoid costly and protracted litigation by signing a coexistence agreement. *See* Marianna Moss, *Trademark "Coexistence Agreements:" Legitimate Contracts or Tools of Consumer Deception?*, 18 LOY. CONSUMER L. REV. 197, 197 (2005) ("[C]oexistence agreements allow potentially confusing trademarks to coexist in the market without trademark infringement lawsuits.").
285. *See* Whelan & Ziv, *supra* note 64, at 156–57.

CSR policies and long-term interests in light of the potentially negative public reaction.[286]

Conclusion

A competitive, market-based economy and adversarial legal system encourage strategic behavior. This system often yields positive economic results. The system can yield serious negative unintended consequences, however, since unethical actors exploit the high costs of the legal system to harm innovators, entrepreneurs, small businesses, non-profits, and society. In particular, strategic legal bullying exploits the high costs of the legal system to advance a baseless legal position that yields a favorable result at the expense of a much weaker party. This Article defines and analyzes this harmful practice in economic terms and classifies it as a form of rent-seeking behavior. The Article also analyzes the various manifestations of strategic legal bullying practices and the defensive methods through which it can be contained. As discussed in the article, business norms, ethics, and corporate social responsibility play a vital role in ongoing efforts to combat the significant harmful effects that arise when companies abuse the legal system for strategic business gain.

286. Larry E. Ribstein, *Delawyering the Corporation*, 2015 Wis. L. Rev. 305, 316 ("Avoiding improper conduct which could hurt the [corporation's] reputation and trigger significant legal fees is an important business function.").